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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

ESTATE OF ELBERT B. WHITT,

LOYD WHITT, EXECUTOR,

Petitioner,

versus

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AND APPENDIX

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QUESTION PRESENTED

Whether the evidenciary presumptions of state property law satisfy the Petitioner's burden of proof in the United States Tax Court in determining the date of transfer of real property for federal estate and gift tax purposes.

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Memorandum Finding of Fact and Opinion of the United States Tax Court, in *Estate of Audry J. Whitt, Loyd Whitt and Willard Whitt, Administrators, et al. v. Commissioner of Internal Revenue,* Nos. 13388-78, 13389-78, and 5422-79, filed May 12, 1983, per the honorable Leo H. Irwin..... A-1

Opinion of the United States Court of Appeals for the Eleventh Circuit, in *Estate of Elbert B. Whitt, Loyd Whitt, Executor v. Commissioner of Internal Revenue, No. 84-7026,* dated February 4, 1985, per the Honorable Elbert Parr Tuttle A-62

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ESTATE OF ELBERT B. WHITT,

LOYD WHITT, EXECUTOR,

Petitioner,

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COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

The Estate of Elbert B. Whitt, Loyd Whitt, Executor, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Tax Court (pp. A-1 to A-61) is reported at 46 T.C.M. (CCH) 118 (1983). The opinion of the United States Court of Appeals for the Eleventh Circuit (pp. A-62 to A-85) is reported at 751 F.2d 1548 (11th Cir. 1985).

JURISDICTION

The opinion of the Court of Appeals was entered on February 4, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND RULES OF COURT INVOLVED

1. The Respondent contends, in the alternative, that transfers of real property by the decedent at or prior to his death are subject to federal estate or gift tax under one of the following provisions of the Internal Revenue Code (26 U.S.C.), as effective for the respective events:

Section 2033

The value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death.

Section 2036(a)

The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by

trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death—

(1) the possession or enjoyment of, or the right to the income from, the property, or

(2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

Section 2501(a) (1)

For the calendar year 1955 and each calendar year thereafter a tax, computed as provided in section 2502, is hereby imposed on the transfer of property by gift during such calendar year by any individual, ...

2. The Tax Court found, and the Court of Appeals affirmed, that the Petitioner did not meet its burden of proof set forth in Tax Court Rule 142(a), which provides as follows:

The burden of proof shall be upon the petitioner, except as otherwise provided by statute or determined by the Court; . . . .

3. The Petitioner contends that, absent any evidence to the contrary, the evidence presented by the Petitioner meets its burden of proof through the operation of Rule 302 of the Federal Rules of Evidence, which provides:

In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law.

STATEMENT

1. Background

Elbert B. Whitt, a resident of Alabama, died on June 14, 1969, at the age of 82. An estate tax return was filed on behalf of his estate. In 1952 and 1959 the decedent deeded to his children certain parcels of real estate in fee simple title without any restrictions or reservations by the grantor. The deeds fully complied with all of the requirements of a legal conveyance in the State of Alabama and were recorded in 1963 and 1964.

The Commissioner of Internal Revenue issued a notice of deficiency to the estate, asserting three alternative positions:

Section 2033—The Commissioner alleged that the deeds were not effective conveyances of the real estate and that the decedent still owned the real property as of the date of his death.

Section 2036—In the alternative, the Commissioner alleged that, if there was an *inter vivos* transfer of the real property, the decedent retained the possession or use of, or the right to the income from, the property.

Section 2501—The Commissioner alleged in the further alternative that if the estate tax did not attach, the transfers were gratuitous conveyances, subject to gift tax in 1963 and 1964, the years in which the deeds were recorded.

2. Tax Court

The Estate petitioned the Tax Court for a review of these deficiency determinations. At trial the Petitioner argued that the transfer date of the real property is determined under the property laws of the State of Alabama and that the real estate deeds introduced into evidence by stipulation were *prima facie* evidence of the ownership and transfer date of the real

property under such state law.[1]

In addition, the Petitioner offered the testimony of an Alabama attorney who had examined the various deeds, and who was prepared to testify that, under the laws of the State of Alabama, the various deeds conveyed the real estate in question in fee simple title as of the date of the execution of the deeds. The Tax Court refused to accept the testimony of the Alabama attorney, and he did not testify. The Petitioner then rested its case.

The Respondent called as witnesses certain of the children of the decedent who were some of the grantees under the deeds.[2] The major evidence elicited by the Respondent from these witnesses was that many of the grantees did not pay any cash consideration for the land conveyed. None of the witnesses testified to facts which would contradict the *prima facie* evidence of the deeds that the land had been transferred or the state law presumption that the deeds had been delivered on the date of execution. In addition, the Respondent presented no evidence of any agreement, oral or otherwise, by which the decedent had retained any interest in the property which would overcome the *prima facie* evidence of a complete conveyance of fee simple title by the deeds. When the Petitioner attempted to examine the grantees with regard to the existence of any such agreement, the Respondent objected, which objection was sustained by the court.

In its decision the Tax Court did not accept the deeds as *prima facie* evidence of the ownership and transfer date of the property or of the conveyance of all of the decedent's interest

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1. Under the laws of the State of Alabama, a real estate deed which is acknowledged and recorded according to state law may be received into evidence in any court without further proof. Ala. Code § 35-4-65 (1975). Alabama Supreme Court Rule 44(e) provides that a deed is self-proving and "shall be prima facie evidence of the facts therein stated." The Alabama courts have stated the presumptive rule that, in the absence of any evidence to the contrary, a deed will be presumed to have been delivered as of the date on which it bears date. *Carroll v. Carroll*, 236 Ala. 556, 183 So. 857 (1938); *Williams v. Armstrong*, 130 Ala. 389, 30 So. 553 (1901).

2. Two of the children, Thomas Whitt and Audry Whitt, were deceased at the date of the trial, and one daughter, Mary Whitt Richardson, did not testify.

in the property to the grantees. The court held that the effectiveness of the deeds under state law was immaterial and that the Petitioner had not met its burden of proof under Tax Court Rule 142(a) to overcome the presumptive correctness of the Respondent's deficiency determination. The Tax Court then made a specific finding as to each parcel, as follows in summary:

Section 2033—Since cash consideration had been paid by one grantee, the court held that his parcel had been transferred on the date the deed was executed. The court held that other parcels were includible under section 2033 since the estate had not presented *any* evidence as to whether adequate consideration had been paid for the real estate, whether the grantees had been placed in possession of the property, or whether the deeds had been accepted by the grantees, and, therefore, the burden of proof had not been met.

Section 2036—The Tax Court made no determination under section 2036, finding that all parcels of real estate were either never transferred during the decedent's lifetime or were *inter vivos* gifts.

Section 2051—The Tax Court held that the remaining parcels of real estate had been transferred during the lifetime of the decedent. It ruled that the transfers occurred on the dates upon which the deeds were recorded, rather than the dates upon which the deeds were executed, the presumptive date of transfer under Alabama law.

3. Court of Appeals

The Court of Appeals refused to rule whether the recorded deeds "would be effective in and of themselves to create a presumption of delivery against the Commissioner" and found as follows:

Section 2033—The Commissioner, in his determination of deficiency, had not made an affirmative finding that the

tracts were includible under section 2033. The court held that "where the only evidence adduced at trial concerning a particular parcel was the recorded deed itself, we believe the Tax Court had no basis for concluding that the parcel had not been effectively conveyed to the stated grantee." The Eleventh Circuit then reversed the Tax Court as to its holding that the property was includible under section 2033.[3]

Section 2036—The Court of Appeals held that the deeds did not overcome the presumptive correctness of the Respondent's deficiency and that the Petitioner would have to present evidence that there was *no* agreement between the parties which would supersede the conveyance of fee simple title as expressed in the deeds. The court held that all the tracts included by the Tax Court under section 2033 were includible under section 2036.

Section 2051—As to the effective date of transfer of the remaining parcels, the Court of Appeals affirmed the holding of the Tax Court that the date of transfer for gift tax purposes was the recordation date of the deeds. The court did not give any consideration to the evidenciary presumption created by Alabama law that a deed is delivered on the date of its execution.

4. Initial Jurisdiction

Jurisdiction in the United States Tax Court, the court of first instance, was invoked under sections 7442 and 6213 of the Internal Revenue Code (26 U.S.C.).

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3. The Petitioner was unable to locate deeds to two parcels of real estate. The inclusion of these parcels in the gross estate under section 2033 is not protested.

REASONS FOR GRANTING THE PETITION

The specific question of whether a deed is *prima facie* evidence of the ownership and transfer date of real property sufficient to meet the Petitioner's burden of proof in the absence of evidence to the contrary is basic to all estate and gift tax litigation. Since the federal estate and gift tax laws are a unique mixture of federal taxation authority over state-determined property rights, it is important for the Supreme Court to express its opinion on this issue.

The sole issue presented in this petition is whether the Petitioner met its burden of proof prescribed by Tax Court Rule 142 with the introduction of the various deeds into evidence. The Petitioner contends that long-established principles developed by this Court affirm that the deeds are *prima facie* evidence dispositive of the issues in this case. The holdings of the lower courts are in direct conflict with these principles.

In *Morgan v. Commissioner*, 309 U.S. 78, 60 S. Ct. 424, 84 L. Ed. 585 (1940), this Court confirmed the basic rule that state law creates the legal interest which is subject to federal estate and gift taxation. These taxes are imposed upon the transfer of property, either at death or upon gratuitous transfer prior to death. In each instance it is the transfer of property, as determined under state law, that is subject to the tax.

This Court ruled in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), that the statutes and legal presumptions of the several states must be applied in the determination of issues decided by state law. This principle has been adopted in the Federal Rules of Evidence. Rule 302 provides that, in civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which state law supplies the rule of decision is determined by state law. This principle has been sustained by this Court with regard to the burden of proof on

several occasions. *See, e.g., Dick v. New York Life Insurance Co.*, 359 U.S. 437, 79 S. Ct. 921, 3 L. Ed. 2d 935 (1959).

This case hinges upon the ownership and transfer dates for certain tracts of real property owned by the decedent at some point prior to his death. Alabama law provides that a deed which is acknowledged and recorded is self-proving and *prima facie* evidence of the facts stated therein. Ala. Code § 35-4-65 (1975). In addition, Alabama law presumes a deed to have been delivered on the date on which it bears date. *Carroll v. Carroll, supra; Williams v. Armstrong, supra.*

Section 2033

The Tax Court refused to give any consideration to the deeds introduced into evidence in its determination of the interest retained by the decedent at his death and admonished counsel for the Petitioner that he was confusing property rights with the tax consequences of a transaction. The Court of Appeals reversed the Tax Court's inclusion of the real estate under section 2033 on other grounds and would not rule as to whether the recorded deeds would be effective in and of themselves to create a presumption of delivery against the Commissioner. This holding is clearly in conflict with *Erie*, which requires the court to apply the state law presumption.

Section 2036

The issue under section 2036 is whether the decedent made an *inter vivos* transfer under which he retained for his lifetime the possession, use, or right to the income from the property. The deeds in evidence were all fee simple deeds by which the decedent conveyed all his right, title, and interest under Alabama law. The Petitioner contends that the deeds are *prima facie* evidence of the complete and unqualified transfer of all interest in the property as expressed in the deeds. Such evidence would remove the property from inclusion in the gross estate under section 2036 unless positive evidence of a contemporaneous agreement is introduced.

The Court of Appeals held that the burden was on the Petitioner to prove the non-existence of any implied agreements that the decedent retained the use of the land or the right to the income. This requires the Petitioner to prove a *negative* fact, that the decedent retained no interest in the property after its transfer. This holding is clearly in conflict with the principles of *Erie* and Rule 302 which require the recognition of state law presumptions establishing property rights. Once the presumption is applied, the deeds show that the property had been transferred without restriction or reservation.

Section 2051

Under section 2051 the issue is whether the property was transferred in 1952 and 1959, the years in which the deeds bear date, or in 1963 and 1964, the year of their recordation.[4] The presumptive rule under Alabama law is that, unless contradictory evidence is introduced, the deeds were delivered and the property transferred on the date of the deeds. Lacking evidence to the contrary, *Erie* and Rule 302 require that the deeds be accepted as *prima facie* evidence of the transfer and that the dates upon the deeds be presumed to be the dates of delivery and transfer. The holding of the Court of Appeals is clearly contrary to these principles.

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4. The Petitioner acknowledged in the proceedings below that the transfers in 1952 and 1959 could have been partially gratuitous. The Respondent has issued no deficiency with respect to those years. It is anticipated that the value of the gifts in those years would not exceed the allowable exemptions.

SUMMARY

By granting this petition and deciding this issue, the Court will simplify all federal estate and gift tax proceedings involving the transfer of real property. Alabama has long accepted a deed which has been acknowledged and recorded according to state law as *prima facie* evidence of the ownership and transfer date of the real estate. This rule eliminates the time-consuming and burdensome procedure of proving the facts recited in a deed in open court. This is especially important where the property has been conveyed many years prior to the date of trial. In this case the deeds were executed some thirty-three and twenty-six years prior to this petition, respectively. In that time the grantor, his wife, and three of his children have died.[5]

The principles developed by this Court in *Erie* and continued in subsequent cases eliminate lengthy proceedings to determine the effectiveness of real property transfers. The burden resulting from failure to apply this rule can be seen in the inordinate detail utilized by the Tax Court to establish the validity and date of transfer for each tract individually.

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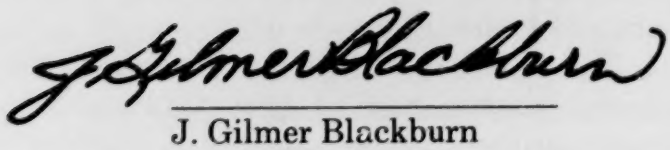
5. An additional child has died since the trial of this case in the Tax Court.

CONCLUSION

Since the decisions of the courts below clearly conflict with the *Erie* doctrine, this petition for writ of certiorari should be granted.

Respectfully submitted,



J. Gilmer Blackburn
Attorney for Petitioner

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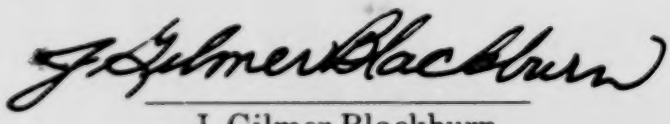
Phone: (205) 353-7826

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for Writ of Certiorari have been served to each of the following by depositing said document in a United States post office, with first class postage prepaid, on this the third day of July, 1985:

Solicitor General
Department of Justice
Washington, D.C. 20530
(3 copies)

Commissioner of Internal Revenue
c/o Chief Counsel
Internal Revenue Service
Washington, D.C. 20224
(3 copies)



J. Gilmer Blackburn

APPENDIX

T.C. Memo. 1983-262

UNITED STATES TAX COURT

ESTATE OF AUDRY J. WHITT, LOYD WHITT AND WILLARD WHITT, ADMINISTRATORS, ET AL.,[1] Petitioners v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket Nos. 13388-78, 13389-78, 5422-79.

Filed May 12, 1983.

Decedent Elbert B. Whitt owned 18 tracts of real property at some point during his lifetime. **Held:** Tract Nos. 2, 3, 4, 5, 8, 9, 10, 11, 14, 15, and 17 are includable in the Estate of Elbert B. Whitt (docket No. 13389-78) under section 2033. **Held further:** Completed gifts of Tract Nos. 1, 6, 7, 12, 13 and 16 were made in the years the deeds were recorded. **Held further:** Tract No. 18 was sold in 1952. **Held further:** Respondent's determination of the fair market value of Tract Nos. 1, 6, 7, 12, 13, and 16 sustained. **Held further:** Petitioner Estate of Elbert B. Whitt (docket No. 5422-79) is not entitled to a specific gift tax exemption under section 2521 for deceased spouse. **Held further:** Estate of Elbert B. Whitt (docket No. 5422-79) is liable for additions to tax under sections 6651(a) (1) and 6653(a). **Held further:** Respondent's determination of the fair market value of real property includable in the Estate of Audry J. Whitt (docket No. 13388-78) sustained. **Held further:** Attorney fees incurred by petitioner Estate of Elbert B. Whitt (docket No. 13389-78) and petitioner Estate of Audry J. Whitt (docket No. 13388-78) are deductible as administration expenses under section 2053(a) (2). **Held further:** Farm equipment and cattle in amounts determined by respondent were owned by Elbert

1. The following cases were consolidated with the above-captioned case for purposes of trial, briefing, and opinion: Estate of Elbert B. Whitt, Loyd Whitt, Executor, docket No. 13389-78 and Estate of Elbert B. Whitt, Loyd Whitt, Executor, docket No. 5422-79.

B. Whitt as of the date of his death (docket No. 13389-78). **Held further:** Petitioners Estate of Elbert B. White (docket No. 13389-78) and Estate of Audry J. Whitt (docket No. 13388-78) are not liable for the addition to tax for fraud under section 6653(b) but are liable for the addition to tax for late filing under section 6651(a) (1).

J. Gilmer Blackburn, for the petitioners.

Frank Simmons, for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

IRWIN, *Judge*: Respondent determined deficiencies in Federal estate and gift tax and additions to tax against petitioners as follows:

Petitioners	Docket No.	Date of Death	Deficiency	Addition to Tax
Estate of Audry J. Whitt, Loyd Whitt and Willard Whitt, Administrators	13388-78[2]	2/26/70	$19,864.62	Sec. 6653 (b)[3] $21,966.31
Estate of Elbert B. Whitt, Loyd Whitt, Executor	13389-78	6/14/69	154,437.76	Sec. 6653 (b) 99,627.88

2. In Amendments to Answer filed on November 19, 1980, in docket Nos. 13388-78 and 13389-78, respondent alleged that if the Court does not find for respondent in regard to the addition to tax for fraud then, in the alternative, the Court should find that petitioners are liable for a 25 percent addition to tax pursuant to section 6651(a) for late filing of the estate tax returns. The alternative additions to tax are in the following amounts: Docket No. 13388-78 — $4,966.16; Docket No. 13389-78 — $38,609.44.

3. Unless otherwise indicated, all statutory references are to the Internal Revenue Code of 1954, as amended and in effect during the taxable years in issue. All Rules references are to the Tax Court Rules of Practice and Procedure.

Petitioners	Docket No.	Date of Death	Deficiency	Addition to Tax
Estate of Elbert B. Whitt, Loyd Whitt, Executor	5422-79	1963	$8,934.39	Sec. 6651 (a) $2,233.60 Sec. 6653 (a) 446.72
		1964	33,826.37	Sec. 6651 (a) 8,456.59 Sec. 6653 (a) 1,691.32

After concession by petitioners and respondent, the issues remaining for our consideration are as follows:[4]

Docket No. 13389-78 (Estate Taxes)

1. Whether Elbert B. Whitt effectively transferred 18 parcels of real property[5] during his lifetime so as to preclude their inclusion in his gross estate or, in the alternative, whether Elbert B. Whitt retained the use and possession of, or the right to the 18 parcels of real property, the ownership of which he had otherwise transferred during his lifetime, for a period that did not end prior to his death.

2. Whether Elbert B. Whitt owned at the time of his death, or during his lifetime retained the use and possession of farm equipment with a value of $8,495[6] and cattle with a value

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4. Our resolution of some of these issues eliminates the need for us to consider certain of respondent's alternative determinations. Additionally, other issues (common to more than one docket number) lend themselves to a single discussion. Therefore, our discussion of the questions presented will not necessarily follow the sequence in which they are listed.

5. The parties agree that the 18 parcels had an aggregate fair market value of $417,526 as of the date of Elbert Whitt's death.

6. The parties stipulated that farm equipment reported in the depreciation schedules of Elbert Whitt's 1967 and 1968 income tax returns is includable in the estate tax return of Elbert Whitt at an agreed upon value of $8,495. A caveat was added, however, to the effect that petitioners did not stipulate that said items were in existence as of the date of death of Elbert B. Whitt or, if in existence, were owned by him at his death.

of $9,003.41, the ownership of which he had otherwise transferred, for a period that did not end with his death.

3. Whether any part of the underpayment of estate taxes of the Estate of Elbert B. Whitt was due to fraud or, in the alternative, whether the Estate is subject to the addition to tax for failure to file an estate tax return under section 6651(a) (1).

4. Whether the Estate of Elbert B. Whitt is entitled to a deduction for attorney fees incurred in connection with the criminal investigation into the failure of Loyd Whitt, as executor, to file the estate tax return.

Docket No. 5422-79 (Gift Taxes)

5. Whether (as an alternative to respondent's position that Elbert B. Whitt did not effectively transfer during his lifetime 18 parcels of real property so as to preclude their inclusion in his gross estate) Elbert B. Whitt transferred during his lifetime real property or interests therein without full and adequate consideration to his children and the heir of his deceased child, which gifts were completed during 1963 and 1964.

6. Whether the value of the gifts completed during 1963 and 1964 was $77,616.61 and $170,431.67, respectively, as determined by the Commissioner.

7. Whether the Estate of Elbert B. Whitt is entitled to the $30,000 lifetime specific gift tax exemption as provided by section 2521 for the wife of the decedent.

8. Whether the Estate of Elbert B. Whitt is subject to the addition to tax for failure to file gift tax returns for 1963 and 1964 under section 6651(a) (1).

9. Whether the underpayments of gift tax for 1963 and 1964 were due to negligence or intentional disregard of rules and regulations within the meaning of section 6653(a).

Docket No. 13388-78 (Estate Taxes)

10. Whether the Estate of Audry J. Whitt understated the value of certain real property owned by the decedent at the time of his death by $21,900.

11. Whether the Estate of Audry J. Whitt is entitled to a deduction for attorney fees incurred in connection with the criminal failure to file charges brought against the co-administrators of the estate.

12. Whether any part of the underpayment of estate taxes of the Estate of Audry J. Whitt was due to fraud or, in the alternative, whether the Estate is subject to the addition to tax for failure to file an estate tax return under section 6651(a)(1).[7]

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7. The remaining issues raised by the pleadings have been settled by agreement of the parties: (1) the parties agreed that Audry J. Whitt, the decedent of docket No. 13388-78, owned bank accounts and certificates of deposit at the date of his death in the total amount, including accrued interest, of $45,321.16, of which the amount of $42,337 was reported on the estate tax return; (2) the parties also agree that Audry J. Whitt owned notes receivable at the date of his death in the total amount, including accrued interest, of $88,289.54, of which the amount of $74,650 was reported on the estate tax return; (3) the parties further agree that Audry J. Whitt's notes receivable, including accrued interest, had a fair market value at the date of his death of $59,745, determined by discounting the notes to return an interest rate of 9 percent; (4) the parties agree that Elbert B. Whitt, the decedent in docket No. 13389-78, owned bank accounts and certificates of deposit at the date of his death in the total amount, including accrued interest, of $224,588.28, of which the amount of $222,098 was reported on the estate tax return; (5) the parties also agree that Elbert B. Whitt owned notes receivable at the date of his death in the total amount, including accrued interest, of $59,225, of which the amount of $28,938 was reported on the estate tax return; (6) the parties further agreed that Elbert B. Whitt's notes receivable, including accrued interest, had a fair market value at the date of his death of $40,076, determined by discounting the notes to return an interest rate of 9 percent; (7) the parties agree that the following items will be adjusted for a tax on a prior return to the extent we hold that such items are includable in both the Estate of Elbert B. Whitt and the Estate of Audry J. Whitt: Certificate of Deposit #7806 — $10,000; Certificate of Deposit #511 —$10,000; Certificate of Deposit #B-326 — $10,000: Note receivable of Ronald Malone — $10,000; Real Property — $84,900; (8) the parties agree that the petitioner in each of the three consolidated cases is entitled to a deduction for reasonable attorney fees and other expenses in litigating these cases in this Court; and (9) the respondent agrees that the petitioner in docket No. 5422-79 is entitled to the $30,000 lifetime specific gift tax exemption for the decedent, Elbert B. Whitt, as provided by section 2521 (repealed for gifts made after December 31, 1976).

FINDINGS OF FACT — ELBERT B. WHITT

Elbert B. Whitt, a resident of Ardmore, Limestone County, Alabama, died on June 14, 1969, at the age of 82. His Will was probated in the Probate Court of Limestone County and his son, Loyd Whitt, who resides in Limestone County, was appointed executor of the Estate. The Estate of Elbert B. Whitt is the petitioner in docket Nos. 13389-78 and 5422-79. A Federal estate tax return for the Estate of Elbert B. Whitt was filed on September 16, 1975, with the Internal Revenue Service Center in Chamblee, Georgia.[8] Elbert Whitt did not file Federal gift tax returns for the years 1963 and 1964.

At the time of his death in 1969, Elbert B. Whitt was a widower. His wife, Nellie Myrtle Whitt, died in June of 1966. Elbert had suffered a stroke in December 1968 but recovered to some extent prior to his death 6 months later. Mr. Whitt had six surviving children as of the date of his death: Willard Whitt, Alton Whitt, Mary Whitt Richardson, Audry J. Whitt, Mahlon Whitt and Loyd Whitt. Another son, Thomas Melvin Whitt, predeceased Elbert B. Whitt and left one surviving child, Margaret Ann Whitt.

The following schedule represents joint bank accounts and certificates of deposit, including accrued interest, of Elbert B. Whitt as reported on his estate tax return, and as agreed by the parties that he owned at the time of his death:

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8. Attached to the return was a statement entitled "Statement as to Reasonable Cause for the Late Filing of the Estate Tax Return of Elbert B. Whitt — Deceased." In the statutory notice of deficiency dated September 8, 1978, respondent did not determine an addition to tax for late filing of the return under section 6651(a). See note 2, *supra*.

	Second Name on Account	As Reported	Agreed Amount
First Federal Savings & Loan of Decatur, C.D. #7349	Loyd	$10,000.00	$10,000.00
First Federal Savings & Loan of Decatur, C.D. #7074	--	10,000.00	10,000.00
First Federal Savings & Loan of Decatur, C.D. #7806	Audry	10,000.00	10,000.00
First Federal Savings & Loan of Decatur, C.D. #7072	Loyd	10,000.00	10,000.00
First Federal Savings & Loan of Decatur, C.D. #7073	Ann	10,000.00	10,000.00
First National Bank, Ardmore, Tennessee, C.D. #1532	Mahlon	3,900.00	3,900.00
First National Bank, Ardmore, Tennessee, C.D. #1531	Ann	10,000.00	10,000.00
Security Federal Savings, Huntsville, AL, C.D. #788	Mary	10,153.00	10,153.00
Security Federal Savings, Huntsville, AL, C.D. #214	Alton	10,125.00	10,125.00
First Federal Savings & Loan of Huntsville, C.D. #B-325	Alton	10,000.00	10,000.00
First Federal Savings & Loan of Huntsville, C.D. #B-326	Audry	10,000.00	10,000.00
First Federal Savings & Loan of Huntsville, C.D. #B-327	Mary	10,000.00	10,000.00
First Federal Savings & Loan of Huntsville, C.D. #B-328	Willard	10,000.00	10,000.00
First Federal Savings & Loan of Huntsville, C.D. #B-329	Mahlon	10,000.00	10,000.00
First Federal Savings & Loan of Huntsville, C.D. #B-704	Willard	10,000.00	10,000.00

First National Bank of Pulaski, Tennessee, Passbook Savings Account	Alton	$10,000.00	$10,000.00
State National Central Bank of Alabama, C.D. #511	Audry	10,000.00	10,000.00
State National Central Bank of Alabama, C.D. #510	Mahlon	10,000.00	10,000.00
State National Bank of Alabama, C.D. #193	Loyd	3,716.00	1,858.00
State National Bank of Alabama, C.D. #194	Loyd	6,283.00	3,141.50
State National Bank of Alabama, C.D. #541	Ann	10,000.00	10,000.00
C.D. #1687		15,762.00	15,672.00
First National Bank of Pulaski, Ardmore, Alabama, Branch		12,159.00	7,350.04
First Federal Savings & Loan of Decatur, C.D. #57804	0	10,000.00	
Accrued Interest on Bank Accounts	0	2,998,74	
Totals		$222,098.00	$224,588.28

After the death of Elbert B. Whitt, Catherine Riethmaier, the mother and legal guardian of Margaret Ann Whitt, granddaughter of Elbert B. Whitt, received three certificates of deposit in the amount of $10,000 each, issued in the names of "Elbert B. Whitt and/or Ann Whitt." She also received on Ann's behalf $400 in interest which had accrued on one of the certificates of deposit during 1969.

The following schedule represents the notes receivable, including accrued interest, of Elbert B. Whitt as reported on his estate tax return, and as agreed by the parties that he owned at the time of his death:

Debtor	As Reported	Agreed Amount
Ronald H. Malone	$10,000.00	$10,000.00
Ben L. McCown	9,000.00	9,000.00
Paul Butler	3,450.00	3,450.00
Bobby Brock	2,350.00	2,350.00
Walter Brooks	1,500.00	2,500.00
Mrs. Willie Jones Mitchell	600.00	600.00
Floyd Vinning	400.00	400.00
Maurice G. Brackeen	0	2,000.00
Gary T. Hargrove	0	9,500.00
Herman Eaves	0	4,700.00
Rudolph Lewter	0	3,000.00
James Young	0	10,000.00
	$27,300.00	$57,500.00
Accrued interest on above notes	1,638.00	1,725.00
Total	$28,938.00	$59,225.00

Maurice G. Brackeen of Elkmont, Alabama, borrowed $5,000 from Elbert Whitt in December of 1960 at 6-percent interest. As of the date of Elbert Whitt's death he still owed $2,000 on this loan. Mr. Brackeen repaid the loan in full including accrued interest on $120 on July 18, 1969, by check to Loyd Whitt.

On January 2, 1969, Elbert Whitt executed his Will and gave a power of attorney to his son Loyd. Loyd Whitt lived approximately 300 yards from his father, saw his father daily and often discussed business with him. Loyd had a high school education.

Elbert Whitt filed Federal income tax returns for each of the years 1967, 1968 and 1969. On his 1967 and 1968 returns Elbert Whitt reported interest income of $4,290 and $5,376.30, respectively, and farm losses of $3,259.17 and $1,040.06, computed as follows:

	1967	1968
Income		
Cattle	$1,753.30	$1,064.61
Swine	340.00	363.30
Cotton		2,140.30
Agricultural Program Payments	5,100.60	4,883.93
Total Income	$7,193.90	$8,452.14
Expenses		
Labor	$1,262.30	$640.00
Seed	562.00	667.80
Fertilizer	2,482.60	1,580.50
Machine Hire	150.00	480.00
Supplies	760.57	667.80
Gasoline	1,240.30	850.90
Repairs	680.30	430.20
Taxes	478.00	478.00
	$7,616.07	$5,795.20

Depreciation Item	Basis	Date Put Into Service	Useful Life	Depreciation Claimed 1967	1968
Massey Ferguson Tractor	$6,100	1968	10	$ 0	$610.00
Tenant House	5,000	1968	20	0	250.00
J.S. Tractor & Equip.	4,000	3/59	10	400.00	400.00
Ford Tractor & Equip.	4,250	1961	10	425.00	425.00
Hay Baler	1,550	1961	10	155.00	155.00
Mowing Machine	595	1963	10	59.50	59.50
Bush Hog	450	1960	10	45.00	45.00
Manure Spreader	590	1963	10	59.00	59.00
Wagon	275	1962	10	27.50	27.50
Trailer	100	1960	10	10.00	10.00
International Truck	3,900	1966	6	650.00	650.00
Ford Corn Picker	1,260	1966	6	210.00	210.00

Elevator	$ 360	1966	10	$ 36.00	$ 36.00
Four Wheel Wagon	160	1966	10	16.00	16.00
New Barn	1,500	1966	20	75.00	75.00
New Barn	1,500	1966	20	75.00	75.00
GMC Truck	2,375	1967	4	594.00	594.00
Total Depreciation				$2,837.00	$3,697.00

	1967	1968
Farm Income	$ 7,193.90	$8,452.14
Farm Expenses	(7,616.07)	(5,795.20)
Depreciation	(2,837.00)	(3,697.00)
Total Farm Loss	$(3,259.17)	$(1,040.06)

Elbert Whitt incurred no income tax liability for his 1967 taxable year. On April 12, 1969, Willard Whitt wrote a check to the Internal Revenue Service for $475 in payment of Elbert Whitt's income taxes for 1968. Willard Whitt signed this check "Elbert Whitt by W. Whitt."

Elbert Whitt's 1969 income tax return is signed "Elbert Whitt by Willard Whitt." Immediately below the signature line appears the typed statement "Filed by Willard Whitt, General Delivery, Ardmore, Tenn. 38449 Son of Deceased (June 14, 1969) -- No administration." The only reported income on Elbert Whitt's 1969 income tax return is $4,058 listed on an attached Schedule E as "land rented to Gov. ASCS Program."

According to his income tax returns for 1967 and 1968 Elbert Whitt sold cattle during both of those years. In February and March of 1969, three cattle buying organizations (the Farmers Auction Company, Tennessee Producers Livestock Marketing Association, and Limestone County Stock Yard) made payments by check to Elbert B. Whitt in the respective amounts of $809.85, $374.30 and $259.67. In May of 1969, Richland Mills issued a check to Elbert Whitt in the amount of $315.97. Each of these checks is endorsed in the name of Elbert

B. Whitt. On July 3, 1969, Farmers Auction Company issued two checks both in the joint names of Loyd and Willard Whitt in the amounts of $5,187.14 and $3,816.27.

The following schedule represents certain farm equipment which is reported in the depreciation schedules on Elbert B. Whitt's 1967 and 1968 income tax returns and which the parties have agreed is includible in his gross estate:

	As Reported	Agreed Amount
Ford Tractor	0	$425.00
Hay Baler	0	155.00
Mowing Machine	0	178.00
Massey Ferguson Tractor	0	4,880.00
GMC Truck	0	593.00
Manure Spreader	0	177.00
Wagon	0	55.00
International Truck	0	1,300.00
Ford Corn Picker	0	420.00
Elevator	0	216.00
Four Wheel Wagon	0	96.00
Totals	0	$8,495.00

The following tracts of land were owned at some period of time by Elbert Whitt:

Tract No.	Date of Deed	Year Deed Recorded	Stated Grantee	Approximate Number of Acres	County	Agreed Fair Market Value at date of Elbert B. Whitt's Death
1	8/21/59	1964	Alton Whitt	118.5	Limestone	$32,588
2	8/21/59	1964	Audry Whitt	63	Limestone	18,900
3	8/21/59	1964	Audry Whitt	70	Limestone	21,000
4	8/21/59	1964	Audry Whitt	50	Limestone	15,000
5	--	--	Audry Whitt	40	Madison	12,000
6	8/21/59	1963	Loyd Whitt	160	Limestone	48,000
7	8/21/59	1964	Mahlon Whitt	118.5	Limestone	32,588
8	8/21/59	1964	Mary Whitt Richardson	60	Limestone	18,000
9	8/21/59	1964	Margaret Ann Whitt	40	Limestone	12,000
10	8/21/59	1964	Margaret Ann Whitt	40	Limestone	12,000
11	8/21/59	1964	Margaret Ann Whitt	40	Limestone	12,000
12	8/21/59	1964	Willard Whitt	40	Limestone	12,000
13	8/21/59	1964	Willard Whitt	40	Madison	12,000
14	3/1/32	1964	Willard Whitt	40	Madison	12,000
15	--	--	Audry Whitt	60	Limestone	18,000
16	8/13/52	1963	Willard Whitt	110	Limestone	33,000
17	8/13/52	1963	Thomas Whitt	97	Limestone	29,100
18	8/13/52	1970	Alton Whitt	191.5	Lincoln and Giles, Tenn.	67,350
						$417,526

On August 21, 1959, Elbert and Nellie Whitt executed a warranty deed which purports to convey 160 acres (Tract No. 6) to their son, Loyd Whitt. The deed recites receipt of "ten dollars and other valuable considerations." Loyd Whitt did not pay his parents any cash for this land. Within 6 months of the date of the deed Loyd Whitt built a house and moved on the land. He planted crops and worked the land continuously. He also paid the property taxes and received income from the 160 acres.

On August 21, 1969, Elbert and Nellie Whitt executed warranty deeds which purport to convey approximately 120 acres (Tract Nos. 9, 10 and 11) to their granddaughter, Margaret Ann Whitt. These deeds recite the receipt of "ten dollars and other valuable considerations."

Margaret Ann Whitt's father, Thomas Melvin Whitt, died in 1957. Subsequently, Elbert Whitt told Margaret's mother, Catherine Riethmaier, that he had given some land to Margaret. No monetary payment was made for this land. Catherine Riethmaier, as guardian for Margaret Ann Whitt, took possession of these tracts of land only after the death of Elbert Whitt. Neither Margaret Ann nor her mother paid property taxes or received any income from this land prior to Elbert Whitt's death.

During the period from the date of the warranty deeds until Elbert Whitt's death, some of the land deeded to Margaret Ann Whitt was cultivated and hogs were raised on the land. She did not receive any income from this land prior to her grandfather's death.

On August 13, 1952, Elbert and Nellie Whitt signed a warranty deed which purports to convey 110 acres to Willard Whitt (Tract No. 16). This deed recites consideration of $1,500. Willard Whitt did not pay his parents any cash for this land.

On March 1, 1932, Bennie and Ellis Reyer signed a warranty deed which purports to convey 40 acres to Willard Whitt for a stated consideration of $650 (Tract No. 14).

On August 21, 1959, Elbert and Nellie Whitt signed two warranty deeds which purport to convey approximately 80 acres to Willard Whitt (Tract Nos. 12 and 13). Each deed recites receipt of "ten dollars and other valuable considerations." Willard Whitt did not pay his parents any cash for this land. Willard took possession of the three tracts of land, paid the property taxes and reported any income earned from the land on his income tax returns.

On August 13, 1952, Elbert and Nellie Whitt signed a deed which purports to convey six parcels of land totaling approximately 191.5 acres (Tract No. 18) to Alton Whitt. Alton paid the $3,000 consideration stated in the deed to his parents in installments of $1,000 a year for 3 years.

On August 21, 1959, Elbert and Nellie Whitt signed a deed which purports to convey 118.5 acres in Limestone County, Alabama, to Alton Whitt (Tract No. 1). The deed recites receipt of "ten dollars and other considerations." Alton Whitt did not pay any cash for this land. Alton did not farm this parcel himself because it was located 8-10 miles away from his farm but did permit his brothers to farm it. He cut timber off the tract and received a check from the Tennessee Valley Authority in payment for a right of way over the land prior to his father's death.

Alton Whitt was unmarried and lived at home with his parents until their deaths. He received two $10,000 certificates of deposit and one $10,000 savings account from his father's estate. He had not made any monetary contribution toward these accounts. He also received two notes receivable for $10,000 and $3,450, respectively. He gave his sister and brothers their respective shares of the amounts of the notes.

On August 21, 1959, Elbert and Nellie Whitt signed a warranty deed which purports to convey 118.5 acres to Mahlon Whitt (Tract No. 7). He did not pay any cash to his parents for this land. He took possession of the land and received the income from it. During the years Mahlon Whitt filed income tax returns he reported the income received from the land.

On August 21, 1959, Elbert and Nellie Whitt signed a warranty deed which purports to convey approximately 60 acres in Limestone County, Alabama, to Mary Whitt Richardson (Tract No. 8). The deed recites the receipt of "ten dollars and other valuable considerations."

On August 21, 1959, Elbert and Nellie Whitt signed three warranty deeds which purport to convey three tracts of land consisting of 63 acres, 70 acres, and 50 acres, respectively, in Limestone County, Alabama, to Audry Whitt (Tract Nos. 2, 3 and 4). Each of these deeds recites the receipt of "ten dollars and other valuable considerations."

On August 13, 1952, Elbert and Nellie Whitt signed a warranty deed which purports to convey 97 acres in Limestone County, Alabama, to Thomas Melvin Whitt (Tract No. 17). The deed recites consideration of $1,500.

On unknown dates Elbert and Nellie Whitt signed two deeds which purport to convey two tracts of land consisting of 40 acres in Madison County, Alabama, and 60 acres in Limestone County, Alabama, to Audry Whitt (Tract Nos. 5 and 15).

All of the deeds introduced into evidence purport to convey a fee simple title to the stated grantees without restriction or reservation.

During 1975, Larry Hollingsworth, Special Agent of the Internal Revenue Service Intelligence Division, participated in an investigation of the Estate of Elbert B. Whitt. At the time of the criminal investigation, the Estate of Elbert B. Whitt had not filed an estate tax return. The return was subsequently filed on September 16, 1975, with the Internal Revenue Service Center in Chamblee, Georgia. Loyd Whitt was not indicted on any criminal charges involving the failure to file an estate tax return for the Estate of Elbert B. Whitt.

In 1975, respondent's expert witness, Richard A. Parks, appraised 980 acres of the above-described tracts of land as of the date of Elbert B. Whitt's death, June 14, 1969 (Tract Nos. 1-15). He assigned a value to this land of $288,076. In 1978, respondent appraised the remaining 398.5 acres of the above-described land (Tract Nos. 16-18) and determined that its fair

market value as of the date of Elbert B. Whitt's death was $129,450. This total date of death value of $417,526 ($288,076 plus $129,450) for the 18 tracts of land determined by respondent is not contested by petitioners.

In the notice of deficiency (docket No. 13389-78) respondent determined that when Elbert B. Whitt died he was the owner of certain bank accounts and notes receivable with a value of $52,238.78. Solely in compromise of the amount the parties have agreed that the notes had a date of death value of $40,076, determined by discounting the notes to return an interest rate of 9 percent.

The respondent further determined that when Elbert B. Whitt died certain farm equipment and cattle with a total value of $17,498.41 which were not reported on the estate tax return were either owned by him or were assets in which he had transferred ownership but retained the use and possession for a period that did not end prior to his death.

The respondent further determined that prior to his death Elbert B. Whitt did not effectively transfer ownership of certain parcels of real property with a value of $417,526 so as to preclude their inclusion in his gross estate. Alternatively, the respondent determined that Elbert Whitt retained the use and possession of, or the right to income from the real property, the ownership of which he had otherwise transferred during his lifetime, for a period that did not end prior to his death.

The respondent further determined that all or part of the underpayment of tax required to be shown on the estate tax return of the Estate of Elbert B. Whitt is due to fraud. In the alternative to fraud, the respondent determined that the Estate of Elbert B. Whitt is subject to the addition to tax under section 6651(a).

As an alternative to the primary and alternative positions taken in the estate tax notice of deficiency applicable to the 18 tracts of land, the respondent alternatively determined in the gift tax notice of deficiency (docket No. 5422-79) that

during 1963 Elbert B. Whitt transferred real property with a value of $77,616.16 for less than full and adequate consideration and that during 1964 Elbert B. Whitt transferred real property with a value of $170,431.67 for less than full and adequate consideration.

The respondent further determined that because Elbert B. Whitt did not file gift tax returns relating to these transfers within the prescribed time for filing and because no showing has been made that the failures to timely file such gift tax returns were due to reasonable cause, the Estate of Elbert B. Whitt is subject to the addition to tax for each of the years 1963 and 1964 under section 6651(a) (1). The respondent further determined that Elbert B. Whitt's failure to pay gift taxes for 1963 and 1964 was due to negligence or intentional disregard of rules and regulations. Accordingly, respondent determined that the Estate of Elbert B. Whitt is subject to the addition to tax under section 6653(a).

FINDINGS OF FACT — AUDRY J. WHITT

Audry J. Whitt, a son of Elbert B. Whitt and a resident of Limestone County, Alabama, died intestate at the age of 52 on February 26, 1970. On March 4, 1970, Loyd Whitt and Willard Whitt were appointed co-administrators of their brother's estate. The Estate of Audry J. Whitt is the petitioner in docket No. 13388-78. A Federal estate tax return for the Estate of Audry J. Whitt was filed on September 16, 1975, with the Internal Revenue Service Center in Chamblee, Georgia.[9]

The following schedule represents the bank accounts and certificates of deposit, including accrued interest, of Audry J. Whitt as reported on his estate tax return, and as agreed by parties that he owned at the time of his death:

	As Reported	Agreed Amount
First Federal Savings & Loan Assn. of Decatur,[10] C.D. #7806	$10,000.00	$10,531.90
Central Bank of Alabama, Athens, C.D. #511	10,000.00	10,000.00
First Federal Savings & Loan Assn. of Huntsville, C.D. #B-326	10,000.00	10,379.70
First National Bank of Pulaski, Tennessee	2,337.00	2,337.00
First National Bank of Pulaski, Tennessee — Savings Account	10,000.00	10,000.00
Accrued Interest on Bank Accounts	0	125.00
First Federal Savings & Loan Assn. of Decatur, C.D. #15,721	0	1,947.56
Totals	$42,337.00	$45,321.16

9. Attached to the return was a statement entitled "Statement in Support of the Late Filing of the Estate Tax Return of Audry J. Whitt — Deceased." In the statutory notice of deficiency dated September 8, 1978, the respondent did not determine an addition to tax for late filing of the return under section 6651(a). See note 2, *supra*.

10. Certificates of Deposit Nos. 7806, 511 and B-326 were received by Audry Whitt from Elbert B. Whitt's estate.

The following schedule represents the notes receivable, including accrued interest, of Audry J. Whitt, as reported on his estate tax return, and as agreed by the parties that he owned at the time of his death:

Debtor	As Reported	Agreed Amount
James Holt	$12,000	$12,000
Donny Young	9,000	0
J.D. Reyer	8,000	8,000
Billy Vickers	7,750	7,750
Thomas W. Campbell	6,300	6,300
Ray Austin Campbell	5,300	5,300
Leon Luna	5,000	4,400
Junior Reyer	4,000	2,500
Lawrence Clem	3,700	3,700
William D. Pollitz	3,230	3,230
Elmer Reyer	2,500	4,000
Silas Eckstein	2,000	2,000
Jessie Fred Eckstein	2,000	0
Jessie Eckstein	0	3,500
Fred Eckstein	0	3,500
John Henry Clem	2,000	2,000
Claude Lewter	1,170	1,170
Early Culps	700	747
Mrs. Charles Boley	0	2,375
Henry Brooks	0	1,000
Martha Hargrove	0	400
Albert Hemphill	0	741
Ronald Malone	0	10,000
Edwin R. Perry	0	1,105
	$74,650	$85,718
Accrued Interest on above notes	0	$2,571.54
Total	$74,650	$88,289.54

Martha L. Hargrove of Ardmore, Tennessee, borrowed $400 from Audry Whitt at 6 percent interest in 1969. She repaid this loan by check to Willard Whitt in July 1970. The amount of the check was $424. The $24 represented interest on the loan.

After the death of Audry J. Whitt, Willard Whitt, as co-administrator of his estate, was aware that Audry had

received certificates of deposit from his father totaling $30,000. He also knew that Audry owned six tracts of land totaling 343 acres. Approximately 1 year after Audry's death, the decedent's heirs (the remaining brothers and sister and one niece) agreed that the 343 acres of land had a value of $81,000. Each heir agreed to either buy or sell his one-sixth interest in the land for $13,500. The Deed was executed on October 28, 1971. The purchaser of the land was Loyd Whitt and his wife, Mary B. Whitt. In the summer of 1971 Alton Whitt received from Willard Whitt $13,500 for his one-sixth share of the agreed value of Audry's land. Six members of the Whitt family each received benefits from Audry's estate of $33,808.

The decedent's 343 acres of real property consisted of six parcels containing the following number of acres: 63 acres, 70 acres, 50 acres, 40 acres, 60 acres, and 60 acres.[11] The tracts are used primarily for the cultivation of crops. The portions of the tracts not used for farming contain numerous hardwood trees.

In connection with the investigation into the failure to file an estate tax return respondent had an appraisal of the decedent's real estate made in 1975. Respondent's appraiser, Richard A. Parks, is a member of the Society of Real Estate Appraisers, the American Society of Appraisers and the Georgia Association of Tax Assessing Officials. Prior to his appraisal of the subject property Mr. Parks had appraised rural property in southern Alabama.

Willard Whitt has a college degree and was a high school teacher for 32 years. Loyd Whitt is a high school graduate and served in the armed forces.

During 1975, Larry Hollingsworth, Special Agent of the Internal Revenue Service Intelligence Division, participated

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11. Five of these parcels are referred to as Tract Nos. 2, 3, 4, 5, and 15 which respondent has also determined are includable in the Estate of Elbert B. Whitt.

in an investigation of the Estate of Audry J. Whitt with Estate Tax Attorney Olie H. Phillips. The co-administrators of Audry's estate sought the services of an attorney and filed the estate tax return after commencement of the criminal investigation. Willard Whitt was indicted for willful failure to file a United States Tax Return for the Estate of Audry J. Whitt in violation of section 7203. On or about June 13, 1977, Willard Whitt pleaded nolo contendere to the indictment. He was found guilty on his plea and sentenced to pay a fine of $100. All charges were dismissed as to Loyd Whitt. J. Gilmer Blackburn, attorney at law, received a total payment of $13,000 for legal services relating to the criminal investigation of both estates.

An estate tax return for the Estate of Audry J. Whitt was filed in September of 1975. In the notice of deficiency the respondent determined that the value of Audry J. Whitt's 343 acres of land at the date of his death was $300 an acre or a total of $102,900, an increase of $21,900 over the amount reported on the estate tax return. The respondent also determined that when Audry J. Whitt died he was the owner of certain bank accounts, certificates of deposit and notes receivable with a value of $66,959.41. In compromise of the amount, the parties have agreed that the notes had a date of death value of $59,745, determined by discounting the notes to return an interest rate of 9 percent. Finally, the respondent determined that all or part of the underpayment of tax required to be shown on the estate tax return of Audry J. Whitt is due to fraud or, in the alternative, that the late filing penalty of section 6651 is applicable.

OPINION

As a preliminary matter, we note that petitioners' chances of prevailing on many of the issues presented in these consolidated cases have been hampered by their counsel's apparent misunderstanding of the nature and the placement

of the burden of proof. Petitioners' case in chief consisted of the introduction of several exhibits and an unsuccessful attempt to present the testimony of an attorney as to his legal opinion of the effectiveness under Alabama law of certain deeds to convey legal title to real property to the stated grantees. The Court sustained respondent's objection on the basis of relevancy and suggested to petitioners' counsel that he was confusing property rights with the tax consequences of a transaction. Petitioners' counsel then rested his clients' case despite the Court's repeated admonition that the burden of proof was upon his clients as to most issues.[12]

A presumption of correctness attaches to respondent's determination in the notice of deficiency. *Welch v. Helvering*, 290 U.S. 111 (1933); Rule 142(a). The nature of this burden of proof is described in *Lyon v. Commissioner*, 1 B.T.A. 378, 379-380 (1925):

> [Rule 142(a) of this Court] provides that the burden of proof is on the taxpayer. That means that he must introduce sufficient evidence to make a *prima facie* showing that the Commissioner committed the errors alleged in the petition and to overcome the proofs submitted on behalf of the Commissioner. Such a showing must cover all the elements necessary to establish the averments of the petition. This [Court] is required by law to make findings of fact. Such findings can not be made upon conjecture, *ex parte* statements, or argument. They must be supported by evidence presented to the [Court]. * * * We can not assume what might be proven by evidence which was not introduced.

Our inability to make findings favorable to the petitioners on

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12. Respondent bears the burden of proof on the issues of fraud, Rule 142(b), and also on the issue of the section 6651(a) additions to tax applicable to docket Nos. 13388-78 and 13389-78 raised for the first time in the Amendments to Answer filed on November 19, 1980. Rule 142(a).

the basis of conjecture or argument on brief has required the resolution of many of the issues presented here in favor of respondent.

Real Property — Elbert B. Whitt (Docket Nos. 13389-78 and 5422-79)

The first issue for our resolution is whether Elbert Whitt effectively transferred certain tracts of real property during his lifetime so as to preclude their inclusion in his gross estate under either section 2033 or section 2036(a) (1). Alternatively, we must decide whether Elbert Whitt made inter vivos gifts of these properties which were complete in 1963 and 1964, the years in which the deeds were recorded. In order for there to be a completed gift of real property petitioner must prove that there was a conveyance sufficient to vest legal title in the donee and also that the donor relinquished dominion and control of the subject matter of the gift by delivery to the donee. *Estate of Mortimer v. Commissioner*, 17 T.C. 579, 582 (1951).[13]

Section 2033 provides that the "value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death." In the notice of deficiency for the Estate of Elbert B. Whitt (docket No. 11389-78), respondent determined that 18 tracts of real property with a fair market value of $417,526 as of the date of

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13. This Court's formulation of the essential elements of a bona fide inter vivos gift is as follows:

> (1) a donor competent to make the gift; (2) a donee capable of taking the gift; (3) a clear and unmistakeable intention on the part of the donor to absolutely and irrevocably divest himself of the title, dominion, and control of the subject matter of the gift, *in praesenti*; (4) the irrevocable transfer of the present legal title and of dominion and control of the entire gift to the donee, so that the donor can exercise no further act of dominion or control over it; (5) a delivery by the donor to the donee of the subject of the gift or of the most effective means of commanding the dominion of it; (6) acceptance of the gift by the donee; * * * [*Guest v. Commissioner*, 77 T.C. 9, 16 (1981) quoting *Weil v. Commissioner*, 31 B.T.A. 899, 906 (1934), affd. 82 F.2d 561 (5th Cir. 1936)]

Elbert B. Whitt's death are includable in his estate. Respondent's primary position is that for Federal estate tax purposes, Elbert Whitt did not effectively transfer any of the 18 parcels of property prior to his death and that, therefore, he retained ownership of them as of the date of his death.

Respondent alternatively argues that Elbert Whitt retained possession or enjoyment of, or the right to income from, the properties so as to require their inclusion in his estate under section 2036(a). Section 2036(a) provides in pertinent part as follows:

> (a) General Rule.— The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death—
>
> (1) the possession or enjoyment of, or the right to the income from, the property * * *.

Section 2036 is designed to include in the gross estate of a decedent all property incompletely transferred during his lifetime. This section requires property to be included in a decedent's gross estate if he retained actual possession or enjoyment (i.e., delayed outright dispostion until his death) *Guynn v. United States*, 437 F.2d 1148 (4th Cir. 1971). The donor's interest need not be reserved by the instrument of transfer nor need it be legally enforceable. *Estate of McNichol v. Commissioner*, 265 F.2d 667 (3d Cir. 1959), affg. 29 T.C. 1179 (1958). The term "enjoyment" as used in section 2036(a) (1) is synonymous with substantial present economic benefit. *United States v. Byrum*, 408 U.S. 125, 145 (1972).

Possession or enjoyment of the property purportedly transferred is retained when there is an express or implied understanding to that effect at the time of the transfer. *Guynn v. United States, supra; Estate of Rapelje v. Commissioner*, 73 T.C. 82, 86 (1979); *Estate of Linderme*, 52 T.C. 305, 308 (1969). We must consider all the facts and circumstances surrounding the transfers as well as the subsequent use of the property in determining whether such an implied understanding existed among the parties. Section 20.2036-1(a), Estate Tax Regs.

The burden of proof is on petitioner to establish that an implied agreement did not in fact exist. Where respondent has determined that an intrafamily prearrangement existed, proving the nonexistence of such an agreement is especially difficult. *Estate of Hendry v. Commissioner*, 62 T.C. 861, 872 (1974); *Estate of Kerdolff v. Commissioner*, 57 T.C. 643, 648 (1972).

Respondent's second alternative position relating to the 18 tracts of real property is that Elbert B. Whitt transferred during his lifetime this property or interests therein without full and adequate consideration to his children and his granddaughter which gifts were completed during 1963 and 1964, the years in which the deeds were recorded. Respondent determined that the value of these gifts was $77,616.16 in 1963 and $170,431.56 in 1964.

Petitioner's position is that the deeds purporting to convey the land to the decedent's children and granddaughter are effective under Alabama law to convey fee simple title to the stated grantees and, therefore, such deeds are conclusive evidence of the effectiveness of the transfer. Petitioner argues that the relevant State statute dealing with the conveyance of land, Ala. Code Sec. 34-4-20, requires only that the conveyance of the land be in writing, be signed and be attested by one witness. Because the deeds fulfill these requirements the land was "legally" transferred in the years the deeds are dated, 1952 and 1959. Therefore, petitioner concludes, Elbert B.

Whitt, did not retain any rights or interests in the property which could be included in his estate.

Respondent counters by arguing that the effectiveness of the deeds themselves under State law is irrelevant. We agree. In *Estate of Mortimer v. Commissioner, supra*, we considered a similar argument. Petitioner contended that the deeds in fee simple contained no reservations in decedent's favor and, therefore, under State law operated to divest him of all incidents of ownership. We stated:

> The basic question goes much deeper than petitioner's arguments, which are bottomed upon an assumed transfer of the properties in fee * * *. We think the facts establish that decedent never completed the inter vivos gifts. If the gifts were not completed, decedent remained the owner of the properties until his death, and the value thereof is includible in his gross estate * * *. [*Estate of Mortimer v. Commissioner, supra*, at 582.]

The tax effects of the transactions at issue here are determined by Federal rather than State law. In *Morgan v. Commissioner*, 309 U.S. 78, 80-81 (1940), the Supreme Court stated:

> State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed. Our duty is to ascertain the meaning of the words used to specify the thing taxed. If it is found in a given case that an interest or right created by local law was the object intended to be taxed, the federal law must prevail no matter what name is given to the interest or right by state law. [Footnote omitted]

Helvering v. Stuart, 317 U.S. 154, 161-162 (1942). Thus, we must look to the Federal tax laws to determine whether the land is includable in Elbert B. Whitt's estate regardless of whether legal title passed to the grantees stated in the deeds under Alabama law prior to his death.

Unfortunately, we must resolve these issues on the basis of a record lacking many relevant facts. As discussed, the burden of proving these facts is on petitioner and we must resolve doubts occasioned by petitioner's lack of proof in favor of respondent. Rule 142(a). In the interest of clarity the tracts of land purportedly conveyed to each grantee and the arguments of the parties with respect to them will be considered together. To reiterate, for each tract we must decide whether it is includable in Elbert B. Whitt's estate under section 2033 or section 2036(a) (1) and/or whether the transfer constituted a gift taxable under section 2501(a).

Tract No. 8 — Mary Whitt Richardson

On August 21, 1959, Elbert and Nellie Whitt signed a warranty deed which purports to convey to their daughter, Mary, approximately 60 acres located in Limestone County, Alabama. The deed recites the receipt of "ten dollars and other valuable considerations." The deed was not recorded until March 13, 1964. Mary Richardson did not testify and no evidence other than the deed was presented concerning this purported conveyance. We have no information as to whether Mary paid anything for the land, whether she took possession of the land prior to her father's death or who paid the taxes and received the income, if any, from the land. Indeed, we do not even know whether Mary had knowledge of the execution of the deed prior to her father's death.

As is the case with all of the deeds under consideration in this case, petitioner chose not to enlighten us as to who had possession of the deed to Tract No. 8 after its execution or why it was not recorded until years later. In *Estate of Mortimer v. Commissioner, supra* at 583, we stated that:

> it is a fundamental principle of law that a deed to be operative must be delivered; it is delivery that gives the deed force and effect. * * * Furthermore, before there can

be a completed delivery of a deed, which will become operative as a conveyance of title, the donee or grantee must accept.

Because petitioner has not sustained its burden of proving that Mary accepted the conveyance and that Elbert Whitt relinquished dominion and control of the land, we must sustain respondent's determination that the tract was not effectively conveyed to Mary Richardson prior to Elbert Whitt's death. Therefore, the agreed fair market value of this tract is includable in Elbert Whitt's gross estate under section 2033.

Tract Nos. 9, 10 and 11 — Margaret Ann Whitt

On August 21, 1959, Elbert and Nellie Whitt signed three warranty deeds which purport to convey a total of approximately 120 acres in Limestone County, Alabama, to Margaret Ann Whitt, the daughter of their deceased son, Thomas. These three deeds were recorded on March 13, 1964. No monetary payment was made in consideration of this land and Margaret's mother, Catherine Riethmaier, testified that as Margaret's guardian she took possession of this land only after Elbert Whitt's death. Prior to his death neither she nor Margaret paid the property taxes. Additionally, even though some of the land was under cultivation and hogs were being raised on the property, Margaret did not receive any income from these three tracts prior to Elbert Whitt's death. Petitioner presented no evidence to contradict this testimony.

Accordingly, we conclude that these tracts were not effectively conveyed to Margaret Ann Whitt prior to Elbert Whitt's death. Therefore, we sustain respondent's determination that they are includable in his estate under section 2033 at their agreed upon fair market values.

Tract No. 17 — Thomas Melvin Whitt

On August 13, 1952, Elbert and Nellie Whitt signed a

warranty deed which purports to convey 97 acres in Limestone County, Alabama, to their son, Thomas Melvin Whitt. The deed recites consideration of $1,500 and was recorded in 1963. Thomas Whitt died in 1957 and was the father of Margaret Ann Whitt.

No evidence has been presented as to whether the stated consideration of $1,500 was actually paid and if so whether that amount equalled the tract's fair market value at the time of conveyance, whether Thomas ever took possession of the land or why the deed was not recorded until 6 years after his death. Indeed, we are not even told who is the current owner of the tract.

Once again, because of petitioner's failure to meet its burden of proof we sustain respondent's determination that Elbert Whitt did not effectively transfer this tract of land during his lifetime. Therefore, the land is includable in his estate under section 2033 at its agreed upon fair market value as of the date of his death.

Tract Nos. 1 and 18 — Alton Whitt

On August 13, 1952, Elbert and Nellie Whitt signed a warranty deed which purports to convey 191.5 acres of land in Lincoln and Giles Counties, Tennessee to their son, Alton (Tract No. 18). The 1952 deed stated that the tract was conveyed for $3,000 and "other good and valuable consideration." The deed was not recorded until December 8, 1970. Alton testified (on direct examination by respondent) that he recalled the transaction in 1952 and that he purchased the land from his parents at that time paying the $3,000 in installments of $1,000 a year for 3 years. He also testified that he rented out the cultivatable portion of the tract and used the remaining hilly portions as pasture.

Although the facts are not as clear and complete as we would like, we found Alton Whitt to be a credible witness and conclude that Tract No. 18 was sold to him in 1952 and that

Elbert Whitt did not retain an interest in this tract at the time of his death so as to require its inclusion in his estate under either section 2033 or section 2036(a) (1).[14]

On August 21, 1959, Elbert and Nellie Whitt signed a warranty deed purporting to convey 118.5 acres of land in Limestone County, Alabama, to Alton Whitt (Tract No. 1). The 1959 deed states that the parcel was conveyed to Alton for "ten dollars and other considerations." This deed was recorded on September 11, 1964.

Alton testified that he did not pay any money to his father in exchange for the 118.5 acres. Alton lived with his parents in their home until their deaths and has never been married. On cross-examination by petitioner's counsel, Alton testified that he performed services for his parents including working around the farm and staying up at night to care for his father after he suffered a stroke in December of 1968.

On brief, petitioner argues that the performance of these services constituted payment for the land. However, these services were only vaguely alluded to in Alton's testimony and the record does not support a finding that an agreement existed between Elbert and Alton to the effect that he would perform services for his father in exchange for the land. In fact, on redirect examination by respondent, Alton testified that he would have performed these services for his father even if he hadn't received the land. In addition, we are not told when this alleged agreement was made, what services were to be performed and for what period of time and whether Alton fulfilled his obligations under the terms of the agreement. Petitioner had ample opportunity to question Alton regarding this alleged agreement but chose not to do so. The inference from this failure to produce such evidence is that the withheld evidence would not have supported petitioner's

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14. We have not been presented with any evidence as to whether the $3,000 paid by Alton constituted the fair market value of the tract in 1952. However, because Elbert Whitt's 1952 taxable year is not in issue here, we need not determine whether the transfer constituted a part sale/part gift in that year which required the payment of gift taxes.

position. *Wichita Terminal Elevator Co. v. Commissioner*, 6 T.C. 1158 (1946), affd. 162 F. 2d 513 (10th Cir. 1947). Thus, we conclude that no consideration was paid for Tract No. 1 and that its transfer to Alton constituted a gift.

We must next determine when the gift of Tract No. 1 became complete. Section 25.2511-2(a), Gift Tax Regs., provides in pertinent part that the gift tax is a "primary and personal liability of the donor, is an excise upon his act of making the transfer, [and] is measured by the value of the property passing from the donor." Section 25.2511-2(b) states that a gift is complete when "the donor has so parted with dominion and control as to leave in him no power to change its disposition, whether for his own benefit or for the benefit of another."

The gift tax "is not aimed at every transfer of the legal title without consideration. * * * It is aimed at transfers of the title that have the quality of a gift and a gift is not consummate until put beyond recall." *Burnet v. Guggenheim*, 288 U.S. 280, 286 (1933); *Todd v. Commissioner*, 51 T.C. 987, 991 (1969); *Estate of Hite v. Commissioner*, 49 T.C. 580, 594 (1968).

The record is unclear as to precisely when Alton began to exercise control over Tract No. 1. Alton testified that this parcel was 8-10 miles from where he was farming and only contained 30-35 acres of cultivatable land and that he therefore allowed his brothers to farm it.[15] He did, however, cut timber from this parcel. He also testified that he received a payment for a power line right of way through this land from the Tennessee Valley Authority prior to Elbert Whitt's death.

Because we are uncertain as to the actual date that the gift to Alton was completed (but do believe that it was prior to Elbert Whitt's death) we sustain respondent's alternative

15. Although Alton testified that he did not take "possession" of Tract No. 1 because of its distance from his farm, we believe his further testimony as to allowing his brothers to farm the tract, his cutting of timber on it and his receipt of a right of way check indicates that he did not understand the legal significance of his use of the term "possession."

determination that the gift was compete in 1964, the year the deed was recorded.[16] We find that Elbert Whitt did not retain an interest in Tract No. 1 at the time of his death so as to require its inclusion in his estate under either section 2033 or section 2036(a) (1).

Tract No. 6 — Loyd Whitt

On August 21, 1959, Elbert and Nellie Whitt executed a warranty deed which purports to convey 160 acres to their son, Loyd. The deed recites the receipt of "ten dollars and other valuable considerations." The deed was recorded on July 12, 1963.

Loyd testified that he did not pay any money to his father for the land. However, at his father's request, he built a house and moved onto the 160 acre tract within 4-6 months of the date of the deed. He planted crops on the property, received all the income therefrom and paid the property taxes. Loyd further testified that he performed services for his parents in exchange for this property.

We simply are not convinced that Loyd's services constituted a bargained for consideration for the land. Rather, we conclude that this transfer of 160 acres constituted a completed inter vivos gift to Loyd. However, as we have not been presented with evidence which would permit a conclusion that the gift was complete and irrevocable prior to the recordation of the deed, we sustain respondent's determination that the gift was complete in 1963. See *Gagne v. Commissioner*, 16 T.C. 498, 502 (1951).

Tract Nos. 2, 3, 4, 5, and 15 — Audry Whitt

On August 21, 1959, Elbert and Nellie Whitt signed warranty deeds which purported to convey three parcels

16. The Alabama recordation statute, *Ala. Code* sec. 35-4-90(a) (1975), states in relevant part:

> All conveyances of real property * * * are inoperative and void as to purchasers for a valuable consideration, mortgagees and judgment creditors without notice, unless the same have been recorded before the accrual of the right of such purchasers, mortgagees or judgment creditors.

consisting of 63, 70 and 50 acres, respectively, to their son (Audry) (Tract Nos. 2, 3, and 4). The deeds recite the receipt of "ten dollars and other valuable considerations." These three deeds were recorded on February 28, 1964.

On unknown dates Elbert and Nellie Whitt conveyed two parcels consisting of 40 acres and 60 acres, respectively, to Audry Whitt (Tract Nos. 5 and 15). Copies of these deeds were not introduced into evidence.

Audry Whitt died in February 26, 1970. Not one scintilla of evidence was presented relative to any of these five tracts as to whether Audry paid any consideration for the land, when he took possession of them or whether Elbert retained any interest in the land. Although it is possible that Audry exercised complete dominion and control over these five tracts years before Elbert Whitt's death, this is mere surmise on our part. We are not free to presume an answer favorable to petitioner. Petitioner's failure to present any evidence to resolve these uncertainties requires a holding that the fair market value of these five parcels as of the date of Elbert Whitt's death is includable in his estate under section 2033. Rule 149(b).

Tract No. 7 — Mahlon Whitt

On August 21, 1959, Elbert and Nellie Whitt signed a warranty deed which purports to convey 118.5 acres to Mahlon Whitt. The deed recites the receipt of "ten dollars and other valuable considerations." The deed to this tract was recorded on September 11, 1964.

Mahlon testified that he did not pay his parents any money for this land. Although there was some confusing testimony about a land swap, money owed to him by his father, and the performance of services in exchange for the land, there is simply no concrete evidence that the transfer of this tract to Mahlon was anything other than a gift.

Mahlon testified that after he received the land in 1959

he rented it out to be farmed,[17] received the income generated thereby, and paid the assessed property taxes. Based on this testimony, we conclude that Elbert Whitt did not retain an interest in Tract No. 7 at the time of his death so as to require its inclusion in his estate under either section 2033 or section 2036(a) (1).

Although we found Mahlon's testimony as to his dominion and control over the property to be credible there is simply not enough evidence to conclude that the transfer of 118.5 acres by deed in 1959 was a complete and irrevocable gift in that year. Therefore, we must sustain respondent's alternative determination that the gift was not complete until 1964, the year the deed was recorded.

Tract Nos. 12, 13, 14 and 16 — Willard Whitt

On August 13, 1952, Elbert and Nellie Whitt signed a warranty deed which purports to convey 110 acres in Limestone County, Alabama, to their son, Willard Whitt (Tract No. 16). Although the deed recites consideration of $1,500 Willard testified that he did not pay any amount of cash to his parents for this land. Willard did testify, however, that after the deed was executed in 1952, he rented the land to a tenant farmer, received the income therefrom and paid the assessed property taxes. The deed to Tract No. 16 was recorded on June 21, 1963.

On August 21, 1959, Elbert and Nellie Whitt signed a warranty deed which purports to convey two parcels of 40 acres each in Limestone County, Alabama, to Willard Whitt (Tract Nos. 12 and 13). Each deed recites the receipt of "ten dollars and other valuable considerations." Willard did not pay his parents any cash for these two tracts. Willard testified that he took possession of these two parcels and paid the property taxes. The deed to Tract No. 12 was recorded on

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17. Mahlon was unable to do much farming himself because he had lost a leg and three ribs serving in the Navy during World War II.

February 28, 1964, and the deed to Tract No. 13 was recorded on March 20, 1964.

Although we are convinced that the transfer of Tract Nos. 12, 13 and 16 were completed gifts to Willard prior to his father's death, there is not enough evidence to conclude that those gifts were complete and irrevocable prior to the recordation of the deeds. Thus, while the tracts are not includable in Elbert Whitt's estate under either section 2033 or section 2036(a) (1), we hold that petitioner made completed gifts of these three tracts in 1963 and 1964, the years the deeds were recorded.

Petitioner introduced a copy of a deed purporting to be a conveyance by Bennie and Ellis Reyer of 40 acres in Madison County, Alabama, to Willard Whitt for a stated consideration of $650 (Tract No. 14). The deed is dated March 1, 1932, and was recorded on March 20, 1964.

Petitioner presented no further evidence concerning this parcel. The only reference to Tract No. 14 in petitioner's brief is the following:

> [R]espondent continually refers in his brief to the parcels of property listed in Exhibit C-1 as if all of the parcels were transferred by Elbert B. Whitt. Petitioner has already shown that Item 14 on Exhibit C-1 was never owned by the decedent. Trial Exhibit 11 is the deed conveying the property in Item 14 from Benny Reyer to Willard Whitt. This property was never owned by the decedent.

Unfortunately for petitioner, we are unable to conclude from the mere introduction of this deed that Elbert Whitt never owned Tract No. 14 or did not possess an interest in this tract of land that would require its inclusion in his estate. We are left with many unanswered questions concerning the circumstances surrounding this purported transfer in 1932. For example, we are not told how old Willard was in 1932, who

supplied the consideration for the transfer or whether Willard merely held the title as a nominee for his father. It is also possible that Willard transferred the property to his father sometime after 1932. We are not even told who currently owns the property. Petitioner had ample opportunity to elicit testimony from Willard concerning this Tract but failed to do so.

Respondent determined that Tract No. 14 is includable in Elbert Whitt's estate under section 2033. The mere introduction of this 1932 deed does not prove that decedent did not have an interest in this property which would require its inclusion in his estate under section 2033. Petitioner has failed to meet his burden of proof. *Welch v. Helvering, supra.* Respondent's determination, therefore, must be sustained.[18]

In summary, we conclude that because of petitioner's failure to meet its burden of proof, Tract Nos. 2, 3, 4, 5, 8, 9, 10, 11, 14, 15, and 17 are includable in Elbert Whitt's estate under section 2033 at their agreed upon fair market value as of the date of his death.[19] We further conclude that Tract Nos. 1, 6, 7, 12, 13, and 16 were completed gifts in the years the deeds were recorded. Finally, we conclude that Tract No. 18 was sold to Alton Whitt in 1952 and is not includable in Elbert Whitt's estate under either section 2033 or section 2036(a) (1).

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18. Our comments in *Wichita Terminal Elevator Co. v. Commissioner*, 6 T.C. 1158, 1165 (1946), affd. 162 F.2d 513 (10th Cir. 1947) are worth repeating here.

> Petitioner has not established the factual allegations in its petition which are material and essential. Respondent was under no obligation to introduce evidence to rebut a fact alleged but not proven by petitioner. [Citation omitted] The rule is well established that the failure of a party to introduce evidence within his possession and which, if true, would be favorable to him, gives rise to the presumption that if produced it would be unfavorable.

19. The total fair market value of the tracts which we have determined are includable in the Estate of Elbert B. Whitt under section 2033 is $180,000.

Fair Market Value of Gifts Completed in 1963 and 1964 (Docket No. 5422-79)

We have concluded that the transfer of Tract Nos. 6 and 16 constituted completed gifts in 1963, the year the deeds were recorded. We have also concluded that the transfer of Tract Nos. 1, 7, 12 and 13 were completed gifts in 1964, the year those deeds were recorded.

The parties agreed that the fair market value of these six parcels as of the date of Elbert Whitt's death in 1969 was as follows:

Tract No.	Amount
1	$32,588
6	48,000
7	32,588
12	12,000
13	12,000
16	33,000

Section 2512 provides that for the purposes of calculating gift tax liability when a gift of property is made "the value thereof as the date of the gift shall be considered the amount of the gift." Respondent determined that for purposes of determining gift tax liability the value of these tracts as of the date the deeds were recorded was as follows:[20]

Tract No.	Date of Gift	Amount
1	1964	$24,351.65
6	1963	33,838.11
7	1964	24,351.65
12	1964	8,967.10
13	1964	8,967.10
16	1963	23,263.70

Total Value of Gifts in 1963 — $57,101.81

Total Value of Gifts in 1964 — $66,637.50

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20. Respondent determined that if we find that all 18 tracts of land were completed gifts in 1963 and 1964, the years the deeds were recorded, then the total value of the gifts made in those years was $77,616.16 and $170,431.56, respectively. Because we have found that Tract Nos. 1, 6, 7, 12, 13 and 16 were completed gifts in those years we need concern ourselves only with that portion of the valuation allocable to those six tracts.

These figures were computed by discounting the agreed upon date of death values to yield 6 percent compound appreciation. Petitioner has not contested respondent's method of valuation and thus we assume that the issue was conceded.[21]

Lifetime Gift Tax Exemption for Spouse of Elbert B. Whitt (Docket No. 5422-79)

Section 2521, as in effect during the years in issue, provided:

> SEC. 2521. SPECIFIC EXEMPTION.
>
> In computing taxable gifts for the calendar year, there shall be allowed [as] a deduction in the case of a citizen or resident an exemption of $30,000, less the aggregate of the amounts claimed and allowed as specific exemption in the computation of gift taxes for the calendar year 1932 and all calendar years intervening between that calendar year and the calendar year for which the tax is being computed under the laws applicable to such years.

The parties stipulated that Elbert B. Whitt did not file gift tax returns for 1963 and 1964. Respondent agrees, however, that the petitioner in docket No. 5422-79 is entitled to a $30,000 lifetime specific gift tax exemption for the gifts that we have found were made in those years. *Damner v. Commissioner*, 3 T.C. 638, 643 (1944).

Petitioner argues that an additional $30,000 specific gift tax exemption should be allowed for Elbert's wife, Nellie Myrtle Whitt, because the deeds were signed by both parties and both individuals were still living in the years the deeds were recorded.

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21. Petitioner (docket No. 5422-79) is entitled to two annual exclusions of $3,000 for 1963 and three annual exclusions for 1964. Section 2503(b). Annual exclusions for Elbert Whitt's wife may not be claimed because her consent was not signified and cannot now be signified. Section 25.2513-2(b)(2) and (d), Gift Tax Regs.

Nellie Whitt died in 1966. The record is silent as to whether there was any administration of her estate. The Estate of Nellie Myrtle Whitt is not a party to this proceeding and no party has the authority to make any claim on her behalf. Respondent's determination that petitioner in docket No. 5422-79 is entitled to only a single $30,000 specific lifetime gift tax exemption is sustained.

Additions to Tax for Negligence and Failure to File Gift Tax Returns for 1963 and 1964 (Docket No. 5422-79)

Respondent determined in the notice of deficiency that if and to the extent we hold that taxable gifts were made by petitioner in 1963 and 1964 then the additions to tax under sections 6651(a) and 6653(a) are applicable. In relevant part, section 6651(a) provides:

> (a) Addition to the Tax. — In case of failure —
>
> (1) to file any return required under authority of subchapter A of chapter 61 * * * on the date prescribed therefor * * *, unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return 5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate.

The relevant portion of section 6653(a) provides:

> (a) Negligence or Intentional Disregard of Rules and Regulations With Respect to Income or Gift Taxes. —If any part of any underpayment * * * is due to negligence or intentional disregard of rules and regula-

tions (but without intent to defraud), there shall be added to the tax an amount equal to 5 percent of the underpayment.

Petitioner has not presented any evidence concerning the applicability of these additions to tax even though it bears the burden of proof. Rule 142(a); *Estate of DiRezza v. Commissioner*, 78 T.C. 19, 32 (1982); *Estate of Mason v. Commissioner*, 64 T.C. 651, 663 (1975), affd. 566 F.2d 2 (6th Cir. 1977); *Capodanno v. Commissioner*, 69 T.C. 638, 650 (1978), affd. 602 F.2d 64 (3d Cir. 1979). On brief, petitioner argues that:

> The petitioners have at all times held the honest belief that the property in question was transferred at the time of the execution of the deeds by Mr. and Mrs. Whitt in 1952 and 1959. The children of the Whitts took immediate possession of the property at those times and considered it to be theirs. With such actions taken by Mr. and Mrs. Whitt and their children, it is reasonable for the petitioners to assume that no gifts were made in 1963 and 1964. This reasonable conclusion would constitute reasonable cause for the failure to file gift tax returns for 1963 and 1964.
>
> Similarly, this same conclusion would bar an assessment of the addition to tax for negligence and disregard of rules and regulations. * * *

Unfortunately for petitioner the record reflects neither that Elbert Whitt "honestly belie[ved]" that the property was transferred as of the date the deeds were signed nor that the children "took immediate possession of the property" and "considered it to be theirs." It was precisely this failure of proof that required us to sustain respondent's determination in docket No. 5422-79 that the transfer of Tract Nos. 1, 6, 7, 12, 13 and 16 did not constitute completed gifts until the years in which the deeds were recorded. This failure of proof also

requires our conclusion that respondent's determination concerning the additions to tax must be sustained. Rule 149(b).

Value of Real Property — Audry Whitt (Docket No. 13388-78)

Section 2031(a) provides that the "value of the gross estate of the decedent shall be determined by including * * * the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated." Section 20.2031-1(b), Estate Tax Regs., provides that the value of every item includable in the gross estate of the decedent is the fair market value as of the date of death. The regulations provide the following definition of the term "fair market value."

> [F]air market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts. The fair market value of a particular item of property includible in the decedent's gross estate is not to be determined by a forced sale price. Nor is the fair market value of an item of property to be determined by the sale price of the item in a market other than that in which such item is most commonly sold to the public, taking into account the location of the item wherever appropriate. [Section 20.2031-1(b), Estate Tax Regs.]

Fair market value is a question of fact to be determined from all relevant evidence in the record. *Kaplan v. Commissioner*, 43 T.C. 663, 665 (1965).

Audry Whitt died intestate on February 26, 1970. Approximately one year later the decedent's heirs (his brothers, sister and niece) agreed that the 343 acres of land owned by the decedent had a value of $81,000 or $236.15 per acre. By a deed dated October 28, 1971, Loyd Whitt and his wife purchased the land from the other heirs. In the notice of deficiency dated September 8, 1978, respondent determined that the real

property owned by decedent Audry Whitt had a fair market value at the date of his death of $300 an acre or a total of $102,900. Accordingly, respondent increased the value of Audry Whitt's taxable estate by $21,900.

Respondent's expert, Richard Parks, made his appraisal of the 343 acres owned by Audry Whitt using the market data approach.[22] Although there were some improvements existing on the land, Mr. Parks made his appraisal as if the land were unimproved. Mr. Parks selected the following four comparison sales in the vicinity of Ardmore, Alabama, which occurred relatively close in time to Audry Whitt's death.

Date of Sale	Number of Acres	Price Per Acre
Aug. 1968	36.4	$ 247
Feb. 1969	100	314
Dec. 1968	160	337
Oct. 1968	40	282

Mr. Parks then adjusted these sales for inflation and the subject parcels' utility for farming using such factors as size, shape, and topography. Based on these comparable sales as adjusted, Mr. Parks concluded that $300 per acre was the fair market value of the 343 acres as of the date of Audry Whitt's death.

Petitioner's sole evidence in support of his position that the fair market value of 343 acres was $81,000 is the deed executed on October 28, 1971, by which five of the heirs sold their one-sixth interest in the land to the sixth heir, Loyd Whitt, for $13,500 each. Other than some vague testimony by Alton Whitt to the effect that he was willing to either buy or sell the property for a total sales price of $81,000, there is no indication in the record how the heirs arrived at a value of $81,000 for the 343 acres. Petitioner did not introduce the report of an appraiser or the testimony of any witness in support of the lesser valuation figure.

22. The appraisal was made during respondent's initial investigation of the estate, prior to the filing of the estate tax return.

Petitioner presents us with only a deed representing a sale between related parties without any evidence that the agreement to sell the property for $81,000 was freely and fairly negotiated. The record is devoid of any information as to whether an appraisal was made after Audry's death, who determined the selling price, which heirs were interested in buying and selling, why Loyd Whitt was ultimately the purchaser and whether other concessions were made by the heirs.

On brief, petitioner correctly states the general rule that the price set by a freely negotiated agreement made reasonably close to the valuation date is persuasive evidence of the fair market value of the property. *Ambassador Apartments, Inc. v. Commissioner*, 50 T.C. 236, 244 (1968), affd. per curiam 406 F. 2d 288 (2d. Cir. 1969); Rev. Proc. 79-24, 1979-1 C.B. 565. Petitioner then agrees that because respondent produced "no evidence that the agreement of the heirs was not freely negotiated * * * [it therefore] fairly represented the value of the lands as of the date of death of Audry J. Whitt."

Again petitioner's misunderstanding of the burden of proof is apparent. A presumption of correctness attaches to respondent's determination of fair market value. Petitioner bears the burden of overcoming that presumption. *Welch v. Helvering, supra; Swiss Colony, Inc. v. Commissioner*, 52 T.C. 25, 38 (1969), affd. 428 F.2d 49 (7th Cir. 1970); Rule 142(a). The transaction was not at arm's length, as between strangers, but rather was between family members and thus is subject to rigid scrutiny. *Mercil v. Commissioner*, 24 T.C. 1150, 1153 (1955). Petitioner has proved only that the land was sold, not that the sale was freely negotiated. Accordingly, respondent need not prove a negative (i.e., that the sale was not arm's length and not bona fide) in order to prevail.

Based on the evidence presented or, more precisely, due to the lack of evidence presented, we are unable to find that petitioner has overcome the presumption of correctness of respondent's determination. Petitioner has not proved that the

$81,000 sale price was the fair market value of the decedent's 343 acres of real property and this failure is fatal to its position.[23] Therefore, we must sustain respondent's determination that the fair market value of the subject land at the date of Audry Whitt's death was $102,900.

Deductibility of Attorney Fees (Docket Nos. 13388-78, 13389-78

The next issues for our decision are (1) whether the Estate of Audry J. Whitt is entitled to a deduction for attorney fees incurred in connection with the criminal failure to file charges brought against the co-administrators of the estate and (2) whether the Estate of Elbert B. Whitt is entitled to a deduction for attorney fees incurred in connection with the criminal investigation into the failure of Loyd Whitt, as executor, to file the estate tax return.[24]

Willard Whitt was indicted for willful failure to file an estate tax return for the Estate of Audry J. Whitt in violation of section 7203.[25] He entered a plea of nolo contendere in

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23. Petitioner attempts to discredit respondent's appraisal in that the appraiser observed the subject tracts of land from adjoining roads rather than by actually walking the land. (Apparently the appraiser was advised by respondent not to actually go on the land.) Although a better view of the land could have been obtained by conducting a thorough on-site inspection, we are unconvinced that the appraisal lacks probative value. Moreover, because petitioner has failed to introduce any evidence to overcome the presumption of correctness of respondent's determination, we need not concern ourselves with the merits of respondent's supporting evidence.

24. The parties have agreed that the petitioners in all three consolidated cases are entitled to a deduction for reasonable attorney fees and other expenses in connection with litigating their cases in this Court. Section 20.2053-3(c), Estate Tax Regs.

25. SEC. 7203. WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned no more than 1 year, or both, together with the costs of prosecution.

response to the misdemeanor indictment and accordingly was convicted and sentenced to pay a fine of $100. All charges filed against Loyd Whitt were dismissed.

J. Gilmer Blackburn, attorney at law, represented both Estates during the criminal investigation and received total legal fees of $13,000 as payment for his services. Mr. Blackburn allocated these fees as follows: $5,000 to the Estate of Elbert B. Whitt, $5,000 to the Estate of Audry J. Whitt, and $3,000 to Willard Whitt personally.[26]

In order to be deductible administration expenses must pass two tests: (1) they must be allowable under State law, and (2) they must meet the requirements of respondent's regulations. *Estate of Reilly v. Commissioner*, 76 T.C. 369, 372 (1981); *Estate of Posen v. Commissioner*, 75 T.C. 355, 359 (1980).[27]

Section 2053(a)(2) provides for a deduction from the gross estate for administration expenses which are allowable by the laws of the jurisdiction under which the estate is being administered. Section 20.2053-3(a), Estate Tax Regs., states that amounts deductible as administration expenses are limited to those expenses "actually and necessarily incurred in the administration of the decedent's estate."[28] Concerning the

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26. Petitioners only claim a total deduction of $10,000 for the fees allocable to the Estates. Respondent apparently does not contest the reasonableness of the fees.

27. See also *Magill v. Commissioner*, T.C. Memo. 1982-148.

28. Sec. 20.2053-3. Deduction for Expenses of Administering Estate.

> (a) In general. The amounts deductible from a decedent's gross estate as "administration expenses" * * * are limited to such expenses as are actually and necessarily incurred in the administration of the decedent's estate; that is, in the collection of assets, payment of debts, and distribution of property to the persons entitled to it. The expenses contemplated in the law are such only as attend the settlement of an estate and the transfer of the property of the estate to individual beneficiaries or to a trustee, whether the trustee is the executor or some other person. Expenditures not essential to the proper settlement of the estate, but incurred for the individual benefit of the heirs, legatees, or devisees, may not be taken as deductions. Administration expenses include (1) executor's commissions; (2) attorney's fees; and (3) miscellaneous expenses. * * *

deductibility of attorney fees as administration expenses, section 20.2053-3(c), Estate Tax Regs., provides in relevant part as follows:

> (1) The executor or administrator, in filing the estate tax return, may deduct such an amount of attorney's fees as has actually been paid, or an amount which at the time of filing may reasonably be expected to be paid. If on the final audit of a return the fees claimed have not been awarded by the proper court and paid, the deduction will, nevertheless, be allowed, if the district director is reasonably satisfied that the amount claimed will be paid and that it does not exceed a reasonable remuneration for the services rendered, taking into account the size and character of the estate and the local law and practice. If the deduction is disallowed in whole or in part on final audit, the disallowance will be subject to modification as the facts may later require.
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> * * *
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> (3) Attorneys' fees incurred by beneficiaries incident to litigation as to their respective interests do not constitute a proper deduction, inasmuch as expenses of this character are incurred on behalf of the beneficiaries personally and are not administration expenses.

Neither the statute nor the regulations specifically address the issue of whether legal fees paid by an estate in connection with respondent's criminal investigation and to defend criminal charges brought against its executor or administrator for failure to file an estate tax return are properly deductible as administration expenses. Respondent contends that the payment of such fees is not properly the expense of the estate as such but rather is a personal expense of the executors. The essential determination is whether these expenses were incurred for the benefit of the estate or for the personal benefit of the executors. *Commercial National Bank of Charlotte v.*

United States, 196 F. 2d 182, 184 (4th Cir. 1952).

As directed by section 2053(a) (2), to resolve this issue we first must look to Alabama law to determine whether the payment of such attorney fees would be "allowable" as an administration expense under State law. *Pitner v. United States*, 388 F.2d 651, 655 (5th Cir. 1967).

Ala. Code section 34-3-60 (1975) which deals with the awarding of attorney fees as costs in connection with the administration of an estate provides as follows:

> Fees paid as part of costs in partition and trust proceedings.
>
> In all actions and proceedings in the probate courts and circuit courts and other courts of like jurisdiction, where there is involved the administration of a trust,[29] or where there is involved the sale of property for distribution, or where there is a partition in kind of real or personal property between tenants in common, the court having jurisdiction of such action or proceeding may ascertain a reasonable attorney's fee, to be paid to the attorneys or solicitors representing the trust, joint or common property, or any party in the action or proceeding, and is authorized to tax as a part of the costs in such action or proceeding such reasonable attorney's fee, which is to be paid when collected as the other costs in the proceeding to such attorneys or solicitors as may be directed or ordered by the court and to be a lien on the several parts in case of partition in kind.

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29. Although the statute uses the term "trust" the Supreme Court of Alabama has held that the "administration of an estate in any court having jurisdiction is the administration of a trust as [described in section 34-3-60] * * *. An administrator or executor is a trustee, and his administration of the estate of a decedent is that of a trust * * *." *Keith & Wilkinson v. Forsythe*, 227 Ala. 555, 151 So. 60, 61 (1933).

In *Zimmerman v. First National Bank of Birmingham*, 348 So.2d 1359, 1367 (Ala. 1977) the Supreme Court of Alabama re-examined and followed a well-established line of cases interpreting this statute as requiring that the "service rendered must be for the common benefit of all the beneficiaries" rather than "in behalf of individual interests." *McCulloch v. Roberts*, 292 Ala. 451, 296 So.2d 163 (1974); *Pate v. Law*, 277 Ala. 608, 173 So.2d 596 (1965); *Farmers' Bank & Trust Co. v. Borroughs*, 217 Ala. 97, 114 So. 909 (1927).

The common thread appearing in the Alabama cases interpreting this statute is that the legal fees must be incurred in a matter that is common to the beneficiaries rather than antagonistic. *McCulloch v. Roberts, supra.* The statute was not intended to authorize beneficiaries "to employ at the expense of the trust attorneys or solicitors for the litigation among themselves of adversary claims as to their respective interests in the trust. In such questions, the trust as a trust is not interested * * *." *Wilks v. Wilks*, 176 Ala. 151, 57 So. 776, 778 (1912).

In *Bidwell v. Johnson*, 191 Ala. 195, 67 So. 985 (1915), the court, in disallowing fees incurred by legatees to obtain a speedier settlement of the estate, stated:

> In allowance of fees for counsel * * * it should be kept in mind that ordinarily there should be an estate or fund discovered, rescued or preserved, which would otherwise be beyond the reach of the parties interested, and that the parties should not be required to contribute to the expense of a barren litigation. [67 So. 2d 985, 988 (1915)]

In *Ingalls v. Hare*, 266 Ala. 221, 96 So.2d 266 (1957), the Supreme Court of Alabama, in allowing attorney fees for the representation of trustees who were charged with fiduciary misconduct, noted that:

> We are clear to the conclusion that the successful defense of the several trustees * * * in the removal cases

> redounded to the benefit of the trusts involved and that such defense was made in good faith. * * * [T]he trusts involved in the removal suits received benefits from the services rendered by the attorneys who represented the respondent trustees. [96 So.2d at 273]

Similarly, in a more recent case, *Birmingham Trust National Bank v. Henley*, 371 So.2d 883 (1979), the Supreme Court of Alabama allowed attorney fees to be taxed against a trust in defending an action for removal of a bank as a co-trustee of a charitable trust.

Neither the parties nor the Court has been able to find a pronouncement by an Alabama court directly in point on the issue before us. However, we conclude from our review of Alabama case law on the general issue of attorney fees that Alabama courts would allow deduction of such attorney fees as are under present consideration[30] when the appropriate case should arise. *Pitner v. United States, supra.*

We also are convinced that the payment of the instant attorney fees meets the requirements of respondent's regulations. The fees were incurred in connection with respondent's criminal investigation of both estates and to defend criminal charges brought against the executors of the Estate of Audry J. Whitt for failure to file the estate tax return. Clearly the charges were brought against Loyd and Willard Whitt in their capacities as co-administrators and executor, not as individuals. Cf. *United States v. Gilmore*, 372 U.S. 39 (1963). This is not a case where legal fees were incurred by a beneficiary in litigation over his own interests where the Estate merely occupied the position of a stakeholder. See *Estate of Dutcher v. Commissioner*, 34 T.C. 918, 925 (1960); *Abbett v. Commissioner*, 17 T.C. 1293, 1301-1303 (1952).

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30. We find the authority cited by respondent as controlling, *Grace v. Solomon*, 241 Ala. 452, 3 So.2d 3 (1941), inapposite in that the Alabama statute interpreted therein is not the one that concerns us here.

Rather, the fees incurred in connection with respondent's investigation and in defense of these criminal charges were "essential to the proper settlement of the estate." Section 20.2053-3(a), Estate Tax Regs.; *Estate of Reilly v. Commissioner, supra* at 373. The Estates as a whole received a benefit from the legal services rendered to the executors.[31] Therefore, payment for such services is deductible as an administration expense under section 2053(a) (2).

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31. We note that counsel allocated $3,000 of the total $13,000 fee as services to Willard Whitt personally. This portion of the fee is not being claimed as a deduction. Respondent draws no distinction between expenses incurred by Willard and Loyd Whitt on the basis that a plea of nolo contendere was entered against the former whereas all charges against the latter were dismissed.

In the context of section 162(a) and 212(3), respondent's argument that legal expenses incurred in connection with the defense of criminal tax charges are "personal" has been soundly rejected. In *Commissioner of Internal Revenue v. Shapiro*, 278 F.2d 556, 560 (7th Cir. 1960), the Court concluded that

> there is no essential difference between legal expenses arising in civil and criminal tax cases. Noting that deductions are granted freely for legal expenses arising in contesting civil tax suits, it is proper that a deduction is allowable for similar expenses in criminal suits. Both instances basically involve the "determination" of tax liability. * * * It logically follows that reasonable legal expenses incident to the determination of income tax liability—whether the litigation be civil or criminal—are deductible expenses. * * *

Moreover, the United States Supreme Court in *Commissioner of Internal Revenue v. Tellier*, 383 U.S. 687 (1966), held that no public policy is offended by permitting a deduction under section 162(a) for attorney fees incurred in the unsuccessful defense of criminal charges in connection with a securities business.

We have considered the recent case of *Jack's Maintenance Contractors, Inc. v. Commissioner*, ___ F.2d___(5th Cir., filed April 18, 1983), rev'g. a memorandum opinion of this Court, wherein the U.S. Court of Appeals for the Fifth Circuit (the court to which an appeal in this case would lie) held that the corporation's payment of legal fees incurred in connection with criminal tax litigation arising out of the personal income tax returns of its sole shareholder and his wife was a constructive dividend and not an ordinary and necessary business expense of the corporation within the meaning of section 162. The instant case is clearly distinguishable both on the basis of the applicable code section involved and the fact that the legal fees in issue here relate to the investigation and determination of the Estates' own tax liabilities, not the personal tax liability of the administrators and executor.

Farm Equipment and Cattle (Docket No. 13389-78)

The next issue for our decision is whether Elbert B. Whitt owned at the time of his death or during his lifetime retained the use and possession of farm equipment with a value of $8,495 and cattle with a value of $9,003.41, the ownership of which he had otherwise transferred, for a period that did not end before his death.

The parties stipulated that farm equipment with values totaling $8,495 which is reported in the depreciation schedules of Elbert Whitt's 1967 and 1968 income tax returns is includable in the gross estate of Elbert B. Whitt.

	As Reported	Agreed Amount
Ford Tractor	0	$ 425
Hay Baler	0	155
Mowing Machine	0	178
Massey Ferguson Tractor	0	4,880
GMC Truck	0	593
Manure Spreader	0	177
Wagon	0	55
International Truck	0	1,300
Ford Corn Picker	0	428
Elevator	0	216
Four Wheel Wagon	0	96
Totals	0	$8,495

However, a caveat was added to the stipulation that the petitioners "make no representation that said items were in existence as of the date of death of Elbert B. Whitt or, if in existence, that such were owned by Elbert B. Whitt at his death."

Elbert Whitt's 1967 and 1968 Federal income tax returns clearly indicate that the decedent owned machinery and cattle during those years.[32] He reported income from the sale of

32. We note that Elbert Whitt's 1967 and 1968 returns bear his name on the signature line. Section 6064 provides that the "fact that an individual's name is signed to a return * * * shall be prima facie evidence for all purposes that the return * * * was actually signed by him." No evidence was introduced to indicate that the returns were not signed by him. See *United States v. Cashio*, 420 F.2d 1132 (5th Cir. 1969).

cattle totaling $1,759.79. On July 3, 1969, subsequent to Elbert Whitt's death, Farmers Auction Company issued two checks both in the joint names of Loyd and Willard Whitt totaling $9,003.41.

With the exception of the Massey Ferguson tractor all the farm equipment determined by respondent to be includable in the Estate of Elbert B. Whitt was depreciated on both his 1967 and 1968 returns. Significantly, the Massey Ferguson tractor first appears on the 1968 return with the notation that it was first put into service in 1968 and that its purchase price was $6,100. Total depreciation of $2,837 and $3,697 for farm equipment was claimed on Elbert Whitt's returns for 1967 and 1968, respectively.

Petitioner presented no credible evidence on this issue. No attempt was made to explain how Elbert Whitt could sell cattle and depreciate farm equipment if such items were not owned by him. Petitioner's bald assertion that Elbert Whitt did not engage in any farm activities after 1959 is simply not supported by the record.[33] We sustain respondent's determination that Elbert Whitt owned cattle with a value of $9,003.41 and farm equipment with a value of $8,495 at the time of his death, as determined by respondent.

Fraud (Docket Nos. 13388-78 and 13389-78)

We must next decide whether the Estate of Elbert B. Whitt and/or the Estate of Audry J. Whitt is liable for the addition to tax for fraud pursuant to section 6653(b). Section 6653(b) provides in relevant part: "If any part of any underpayment * * * of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment. * * *" In determining the amount of the underpayment, only the tax shown on a timely return is taken into account. Section 6653(c) (1).

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33. Elbert Whitt's 1967 and 1968 Federal income tax returns both contain a Schedule F which reflects farm losses for those years.

The existence of fraud is an issue of fact to be determined from a consideration of the entire record. *Stratton v. Commissioner*, 54 T.C. 255, 284 (1970). The law is clear that the burden of proving fraud is on the respondent and that such proof must be clear and convincing. Section 7454(a); Rule 142(b); *Estate of Temple v. Commissioner*, 67 T.C. 143 (1976); *Beaver v. Commissioner*, 55 T.C. 85, 92 (1970).

However, respondent need not prove the precise amount of the underpayment resulting from fraud. Rather, respondent need prove only that "any part" of the underpayment was due to fraud. *Plunkett v. Commissioner*, 465 F.2d 299 (7th Cir. 1972); *Estate of Brame v. Commissioner*, 25 T.C. 824 (1956), affd. per curiam 256 F.2d 343 (5th Cir. 1958); *Otsuki v. Commissioner*, 53 T.C. 96, 105 (1969).

As stated by the United States Court of Appeals for the Fifth Circuit:

> Fraud implies bad faith, intentional wrongdoing and a sinister motive. * * * Negligence, whether slight or great, is not equivalent to the fraud with intent to evade tax named in the statute. The fraud meant is actual, intentional wrongdoing and the intent required is the specific purpose to evade a tax believed to be owing.

Webb v. Commissioner, 394 F.2d 366, 377 (5th Cir. 1968), quoting *Carter v. Campbell*, 264 F.2d 930, 935 (5th Cir. 1959); *Marcus v. Commissioner*, 70 T.C. 562, 577 (1978), affd. without opinion 621 F.2d 439 (5th Cir. 1980).

In order to prove fraud, respondent must show that the taxpayer intended to evade taxes by conduct calculated to conceal, mislead or otherwise prevent the collection of such taxes. *Webb v. Commissioner*, 394 F.2d 366, 377 (5th Cir. 1968); *Marcus v. Commissioner, supra.* "Fraud implies bad faith, intentional wrongdoing and a sinister motive. It is never imputed or presumed and the courts should not sustain findings of fraud upon circumstances which at the most create only suspicion." *Olinger v. Commissioner*, 234 F.2d 823, 824

(5th Cir. 1956) quoting *Davis v. Commissioner*, 184 F.2d 86, 87 (10th Cir. 1950).

The executor of the Estate of Elbert B. Whitt was the decedent's son, Loyd Whitt. The co-administrators of the Estate of Audry Whitt were the decedent's brothers, Loyd and Willard Whitt. As the question of fraud is one of fact which is to be ascertained by an examination of the taxpayer's entire course of conduct, *Fiorella v. Commissioner*, 361 F.2d 326 (5th Cir. 1966), affirming a Memorandum Opinion of this Court, we must examine the course of conduct of Loyd and Willard Whitt and the entire record to determine whether any part of the underpayment in these cases is due to fraud. In so doing we have considered Willard Whitt's conviction on a plea of nolo contendere only as a part of the general background of the case. See *Hershey v. Commissioner*, T.C. Memo. 1962-277, affd. by unpublished opinion (9th Cir. 1964).

Section 6018(a) (1) as in effect for the estates of decedents dying on or before December 31, 1976, required the executor to file an estate tax return at the death of a citizen or resident in all cases where the gross estate exceeds $60,000. Section 6075(a) as it was applicable to the estates of decedents dying on or before December 31, 1970, required that the returns required by section 6018(a) (1) be filed within 15 months after the date of decedent's death.

There is no question that the executor and co-administrators did not file timely estate tax returns for the two estates. In fact, no estate tax returns were filed until respondent began a criminal investigation. There is also no doubt that both gross estates exceeded the $60,000 minimum filing requirement of section 6018(a) (1).

However, we are not convinced from the facts presented that the section 6653(b) additions to tax for fraud apply in these cases. Although we have found that many of the tracts of land which were ostensibly deeded to Elbert Whitt's children in 1952 and 1959 are includable in Elbert Whitt's estate, those findings were required by the abysmal state

of the record and petitioner's failure to sustain its burden of proof rather than our being convinced by a full exposition of the facts that Elbert Whitt actually retained an interest in most of those tracts. Clearly, this failure of proof on petitioners' behalf is not adequate to sustain respondent's burden of proof on the fraud issue. *George v. Commissioner*, 338 F.2d 221, 223 (1st Cir. 1964); *Goldberg v. Commissioner*, 239 F.2d 316 (5th Cir. 1956); *Reis v. Commissioner*, 1 T.C. 9, 13 (1942).

Petitioners argue that Loyd and Willard Whitt were inexperienced in their roles as executor and co-administrators and were not aware of the duties imposed on them under Federal tax law. They argue that their activities involved with the administration of the two Estates consisted entirely of duties involved with Alabama probate procedure and that most of the assets (such as the real property and certificates of deposit held jointly by the decedent and one of his children or his granddaughter which respondent determined are includible in Elbert Whitt's estate) never came into their hands. Section 20. 2002-1, Estate Tax Regs., states in pertinent part:

> The Federal estate tax * * * is payable by the executor or administrator of the decedent's estate. This duty applies to the entire tax, regardless of the fact that the gross estate consists in part of property which does not come within the possession of the executor or administration.

Thus, there is no doubt that the executor of an estate has the duty under Federal tax law to determine the full extent of the assets in an estate regardless of what actually comes into his possession. It is also clear that Loyd Whitt and Willard Whitt did not fulfill this duty. While this dereliction of duty constitutes negligence and perhaps even gross negligence, we are unable to find on these facts that the failure to file the instant estate tax returns constitutes fraud.

Respondent argues that Willard and Loyd Whitt knew that the filing requirement was $60,000 and that both of the

gross estates exceeded that amount. While there is some evidence that they were informed of the filing requirement during the probate of the Estates, we simply are not convinced by the record and certainly not by clear and convincing evidence that Loyd and Willard possessed the requisite sinister motive or even understood the nature and extent of their duties as executor and co-administrators under Federal tax law prior to respondent's initiation of the criminal investigation. Therefore, we hold that neither the Estate of Elbert B. Whitt nor the Estate of Audry J. Whitt is liable for the addition to tax for fraud under section 6653(b).

Additions to Tax for Late Filing (Docket Nos. 13388-78 and 13389-78)

Section 6651(a) (1) provides for the imposition of an addition to tax for the failure to timely file a return "unless it is shown that such failure is due to reasonable cause and not due to willful neglect." Generally, the burden is on the taxpayer to prove that the failure to file a timely return was due to reasonable cause. *Fischer v. Commissioner*, 50 T.C. 164 (1968); *Bebb v. Commissioner*, 36 T.C. 170, 173 (1961); Rule 142 (a). Late filing will be held to be due to reasonable cause if the taxpayer exercised "ordinary business care and prudence" in attempting to file a timely return. Section 301.6651-1(c) (1), Proced. & Admin. Regs.

In docket Nos. 13388-78 and 13389-78 this issue was first raised by respondent in Amendments to Answer filed on November 19, 1980. The respondent, by not determining these additions to tax in the notice of deficiency but instead affirmatively pleading such has raised new matter for which he bears the burden of proof. Rule 142(a).

When the estate tax return for the Estate of Elbert B. Whitt was filed in 1975, the following statement was attached to the return.

STATEMENT AS TO REASONABLE CAUSE FOR THE LATE FILING OF THE ESTATE TAX RETURN OF ELBERT B. WHITT — DECEASED

Loyd Whitt, the Executor of the Estate of Elbert B. Whitt, is a full time farmer. He had no experience in administering estates and had never seen an Estate Tax Return, or been associated with the administration of any estate prior to his appointment as Executor of the Estate of Elbert B. Whitt.

In the administration of the Estate, an attorney advised the Executor that a Federal Estate Tax Return would be due only if the estate exceeded $60,000. The assets the Executor had under his administration (probate assets) did not exceed the $60,000.

In 1966, and 1967, Elbert Whitt transferred all of his certificate of deposits and savings accounts to his children by having a certificate issued in his name and the name of his child. Under the laws of the State of Alabama, Title 5, Sec. 128(2) 1940 Code of Alabama, the child received as of the date of transfer a present right to withdraw all of the funds. Because of this present right and the laws of the State of Alabama, the Certificate of Deposits and Savings Accounts were not part of the probate estate.

Loyd Whitt, the Executor, and the other members of the family were not aware of Sec. 2040, 1954 Internal Revenue Code which requires the inclusion, in the gross estate, of the value of all property deposited by the decedent and other persons, with any person carrying on the banking business, in joint names and payable to either/or the survivor. This provision requires the account to be included in the Estate Tax Return, even though it was not part of the Probate Estate.

When this provision of Sec. 2040 was brought to the attention of the Executor, he employed counsel to prepare

the Estate Tax Return. The late filing of the return was due to the incorrect interpretation of the law, and not due to the willful neglect of the Executor. Based upon the background of the executor it was not unreasonable for him to assume that an Estate Tax Return should not be filed unless the probate assets exceeded $60,000.

Under penalties of perjury the undersigned Executor states that the above facts are true and correct, to the best of his knowledge and belief.

When the estate tax return for the Estate of Audry J. Whitt was filed in 1975 the following statement was attached to the return.

STATEMENT IN SUPPORT OF THE LATE FILING OF THE ESTATE TAX RETURN OF AUDRY JEROME WHITT — DECEASED

Audry Jerome Whitt died on February 26, 1970 without a Last Will and Testament. Letters of administration were granted to Willard Whitt and Loyd Whitt by the Probate Court of Limestone County, on the 4th day of March, 1970. Loyd Whitt was the Executor of the Estate of Elbert Whitt, who died on June 14, 1969. Audry Jerome Whitt was a son and beneficiary of the Estate of Elbert Whitt.

Willard and Loyd Whitt were not aware of the provision of the Federal Estate Tax Laws and had no experience in administering estates. They had been informed that an Estate Tax Return would be due if the value of an estate exceeded $60,000. It was their impression that this amount applied to the probate estate for which they were responsible.

The court set bond for the administrators on the 4th day of March 1970 at $50,000. Sec. 96 Title 61, 1940 Code of Alabama requires a Probate Judge to set a bond at

double the estimated value of the personal property and double the estimated value of three years rental income or, at the descretion [sic] of the Probate Judge, at double the value of the personal and real property. As provided by Sec. 100, Title 61, 1940 Code of Alabama the Probate Judge is liable on his own bond for taking an insufficient bond from the administrator.

The administrators discovered that the decedent had apparently made loans to various individuals during his lifetime. The amount and value of these loans could not be determined until sometime after the decedent [']s death. In addition the decedent, Audry Jerome Whitt, was a beneficiary under the Last Will and Testament of his father Elbert Whitt. Since Elbert Whitt had died just prior to the death of Audry Jerome Whitt, and the heirs of Elbert Whitt were the same as the heirs of Audry Jerome Whitt the administration of the two estates were interwoven. The estate of Audry Jerome Whitt could not be determined until after the administration of the Estate of Elbert Whitt.

When the provisions of the Estate Tax Law [r]equiring the filing of an Estate Tax Return were brought to the attention of the administrators, they employed counsel to prepare the Estate Tax Return. The late filing of the return was due to a[n] incorrect interpretation of the law, and not due to the willful neglect of the administrators. Based upon the background of the administrators, it was not unreasonable for them to assume that an Estate Tax Return should not be filed unless the probate assets exceeded $60,000.

Under the penalties of perjury the undersigned administrators state that the above facts are true and correct, to the best of their knowledge and belief.

Petitioners' argument on this issue is that Loyd and Willard Whitt did not know that the assets which were taxable for Federal estate tax purposes included assets not subject to

their jurisdiction in State probate court under Alabama law. We believe the evidence clearly shows that they were negligent and did not exercise "ordinary business care" in not determining whether returns were required to be filed. In *Shoemake v. Commissioner*, 38 T.C. 192, 202 (1962) we stated:

> Whether a failure to file a return was due to reasonable cause is essentially a question of fact. * * * We have held that taxpayers who deliberately omit to file returns must use reasonable care to ascertain that no returns are necessary, and that in the absence of obtaining competent advice, the mistaken belief on the part of a taxpayer that no return was required under the statute does not constitute reasonable cause for noncompliance. * * * And it should be pointed out that ignorance of the law does not amount to reasonable cause for purposes of this statute [Citations omitted]

We hold that respondent has sustained his burden of proving that no reasonable cause existed for the failure to timely file estate tax returns for the Estate of Elbert B. Whitt and the Estate of Audry J. Whitt.

Decisions will be entered under Rule 155.

ESTATE OF Elbert B. WHITT,
Loyd Whitt, Executor, Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

No. 84-7026.

United States Court of Appeals, Eleventh Circuit.

Feb. 4, 1985.

Appeal from the Decision of the United States Tax Court.

Before RONEY and HENDERSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

This is an appeal from a judgment of the Tax Court upholding the determination of the Commissioner of Internal Revenue ("Commissioner") that there were deficiencies in federal estate and gift taxes paid by the estate of Elbert B. Whitt ("Estate").

Elbert B. Whitt, a resident of Ardmore, Limestone County, Alabama, died June 14, 1969, at the age of 82. On September 12, 1975, the executor of his estate, his son, Loyd H. Whitt, filed a federal estate tax return. The return stated that the decedent owned no real estate at the time of his death and further represented that "[i]n 1959 the decedent and his wife deeded all farmlands owned by them to their children."

Following an investigation, the Commissioner determined that during his lifetime Elbert Whitt had owned 18 parcels of farmland which he had gratuitously conveyed to his children and one grandchild while retaining the actual

possession or use of or the right to income from the property until his death. The Commissioner thus determined that these tracts, valued at $417,526 at the time of death, were includable in the decedent's gross estate under Section 2036(a)(1) of the Internal Revenue Code of 1954 ("IRC") (26 U.S.C. § 2036). Alternatively, the Commissioner determined that any of these parcels which were not effectively conveyed before Whitt's death were taxable under IRC § 2033 (26 U.S.C. § 2033) as property in which the decedent had an interest at the time of his death.

As a second alternative position, the Commissioner determined that, although the decedent may have effectively conveyed all of his interest in these parcels to his children, these were gratuitous conveyances for less than adequate and full consideration, and thus constituted gifts subject to the federal gift tax under IRC §§ 2501 *et seq.* (26 U.S.C. §§ 2501 *et seq*). The Commissioner further determined that these gifts were not completed until the recordation of the deeds and that consequently the gift tax on each conveyance was due in the year in which the deed was recorded.

The Estate petitioned the Tax Court for review of these deficiency determinations, contending that all of Elbert Whitt's interest in these parcels had been effectively conveyed to the respective grantees during his lifetime. Thus, none of the property was includable in the decedent's estate. Moreover, the land was in every instance conveyed for full and adequate consideration, either in cash or in services performed for the decedent. In any event, even if these conveyances were gifts, they were complete and irrevocable at the time the deeds were delivered to the respective grantees. Thus, each conveyance was subject to the gift tax when the deed was executed and delivered, not when it was recorded.

At the hearing before the Tax Court, the Estate, as the petitioner, introduced into evidence the warranty deeds executed by the decedent conveying 15 of the 18 parcels. Another

deed was introduced whereby third parties conveyed one of the parcels to one of the decedent's sons. The Estate proffered only one witness, an attorney, to testify as to the validity and effectiveness of these deeds to transfer title under the laws of Alabama. The Tax Court excluded this testimony. The Estate then rested its case.

The Commissioner called several witnesses, including several of the decedent's children, all of whom were cross-examined by the Estate.

As to 11 of the parcels, the Tax Court sustained the Commissioner's alternative determination that they were includable in the decedent's gross estate pursuant to Section 2033. It also concluded that six of the parcels were gifts subject to gift taxes in the years of recordation, 1963 or 1964. The court found that only one parcel had actually been sold during Whitt's lifetime and was thus not subject to either tax.

BACKGROUND

At issue are 18 separate tracts of rural land of varying size —14 in Limestone County, Alabama, three in Madison County, Alabama, and one in Tennessee. A summary chart of the conveyances involved is set forth in the margin.[1] It may be

1.

Tract No.	Date of Deed	Date Recorded	Stated Grantee	Approximate No. of Acres	County	Fair Market Value Date of Death	Fair Market Value When Deed Recorded	
1	8/21/59	9/11/64	Alton Whitt	118.5	Limestone	$32,588	$24,352	
2	8/21/59	2/28/64	Audry Whitt	63	Limestone	18,900	14,123	
3	8/21/59	2/28/64	Audry Whitt	70	Limestone	21,000	15,692	
4	8/21/59	2/28/64	Audry Whitt	50	Limestone	15,000	11,209	
5	--	--	Audry Whitt	40	Madison	12,000	8,967	(1964)
6	8/21/59	7/12/63	Loyd Whitt	160	Limestone	48,000	33,838	
7	8/21/59	9/11/64	Mahlon Whitt	118.5	Limestone	32,588	24,352	
8	8/21/59	3/13/64	Mary Whitt Richardson	60	Limestone	18,000	13,451	
9	8/21/59	3/13/64	Margaret Ann Whitt	40	Limestone	12,000	8,967	
10	8/21/59	3/13/64	Margaret Ann Whitt	40	Limestone	12,000	8,967	
11	8/21/59	3/13/64	Margaret Ann Whitt	40	Limestone	12,000	8,967	
12	8/21/59	2/25/64	Willard Whitt	40	Limestone	12,000	8,967	
13	8/21/59	3/20/64	Willard Whitt	40	Madison	12,000	8,967	
14	3/1/32	3/20/64	Willard Whitt	40	Madison	12,000	8,967	
15	--	--	Audry Whitt	60	Limestone	18,000	13,451	(1964)
16	8/13/52	6/21/63	Willard Whitt	110	Limestone	33,000	23,264	
17	8/13/52	11/16/63	Thomas Whitt	97	Limestone	29,100	20,514	
18	8/13/52	12/8/70	Alton Whitt	191.5	Lincoln and Giles, Tenn.	67,350	--	

noted that 12 of these deeds were executed on August 21, 1959, and that all of the introduced deeds save one were recorded over a 15-month period between June 21, 1963 and September 11, 1964.

Elbert Whitt was a farmer who had utilized primarily tenant farmers and mules in cultivating his lands in northeastern Alabama and nearby parts of Tennessee. His sons testified that at his age he felt uncomfortable shifting to the use of tractors and other modern farming equipment and techniques and so he decided to turn his land over to his children. Some of it was deeded over to three of his sons in 1952. Deeds on Whitt's remaining farmland were executed on August 21, 1959. Each recited the receipt of $10 and other valuable consideration.

While these deeds appeared to dispose of all of Elbert Whitt's farm properties, he continued to receive commodity program payments from the Agricultural Stabilization and Conservation Service ("ASCS") until his death. Moreover, in his 1967 and 1968 income tax returns, he reported income and expenses from the raising of cattle, swine and cotton. He also claimed depreciation of numerous farm implements, including three tractors, one of which had been purchased in March 1959. The depreciation schedules attached to these returns also indicated that Elbert Whitt had regularly purchased agricultural implements after the execution of the deeds in August 1959, both before and after the recordation of the various deeds.

Following is a recitation of the facts developed with respect to each of the 18 tracts:

Tract No. 1

On August 21, 1959, Elbert and Nellie Whitt conveyed 118.5 acres in Limestone County by warranty deed to Alton Whitt, their son. Although the deed recited the receipt of $10 and other considerations, Alton did not pay any cash. Alton

was unmarried and lived at home with his parents until their deaths. During this time he performed services for his parents, including working around the farm and staying up nights to care for Elbert after his stroke in December 1968. He testified that he would have performed these services anyway, whether or not he had received the land.

Alton did not farm the land which he received from his parents himself. However, he did permit his brothers to farm it. He also cut timber on the property from time to time. At some time prior to Elbert's death, Alton received a check from the Tennessee Valley Authority in payment for a right of way across the land. At no point in his testimony did Alton indicate whether any of these activities took place before his deed was recorded on September 11, 1964.

The Tax Court determined that, in light of Alton's testimony, Elbert Whitt had effectively parted with all of his interest in Tract No. 1 before his death. However, the Tax Court also concluded that Alton did not pay consideration for the conveyance, and that it was therefore a gift which was not completed until the deed was recorded in 196[illegible]

Tracts Nos. 2, 3 and 4

On August 21, 1959, Elbert and Nellie Whitt executed three warranty deeds to Audry Whitt, their son, conveying separate tracts of 63 acres, 70 acres and 50 acres respectively in Limestone County . Each deed recited the receipt of $10 and other valuable considerations. All three were recorded on February 25, 1964.

Audry Whitt died in 1970. No other evidence aside from the deeds themselves was introduced with respect to these three tracts.

The Tax Court concluded that these tracts were includable in Elbert Whitt's estate under Section 2033.

Tracts Nos. 5 and 15

The Commissioner determined that at some unknown time Elbert Whitt had executed a deed to Audry Whitt conveying 40 acres in Madison County and 60 acres in Limestone County. No deeds or other evidence were introduced at the hearing concerning these tracts. The Tax Court concluded that the estate had utterly failed to overcome the presumption of correctness accorded to the Commissioner's deficiency determination as to either tract, and held that both were includable in the decedent's estate under Section 2033.

Tract No. 6

On August 21, 1959, Elbert and Nellie Whitt conveyed 160 acres in Limestone County by warranty deed to Loyd Whitt, their son. Although the deed recited receipt of $10 and other valuable considerations, Loyd did not pay cash. Within six months of the execution of this deed, Loyd, at Elbert's request, built a house and moved onto the land. According to his testimony, he planted crops and worked the land continuously. He also paid property taxes and received the income derived from the 160 acres.[2] Although Loyd did not pay cash for the land, he claims that he performed services for his parents in their later years, such as driving his father into town and taking his mother to the hospital every week, and that he considered these services as being in payment for the property.

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2. During an interview with two special agents of the IRS in 1975, Loyd Whitt stated that at the time Elbert conveyed this land to him, Elbert said he was to retain all rents and payments on the land. As a result, Elbert received all ASCS and rent payments on Tract No. 6. This evidence was introduced, apparently for the purpose of impeaching Loyd's testimony concerning the disposition of the income from the land, only after Loyd had been excused. Thus, he was not given an opportunity to explain the apparent inconsistency between his testimony and the remarks which he had made during the interview in 1975. However, counsel for the Estate withdrew his objection to the admission of this evidence and agreed that the unavailability of Loyd Whitt to respond should go to the weight rather than the admissibility of the interview.

The deed was recorded July 12, 1965.

The Tax Court concluded that Elbert Whitt had effectively conveyed this property to Loyd Whitt during his lifetime. Thus it was not includable in the estate. However, the court also concluded that Loyd's services to his parents were not a bargained-for consideration for the conveyance and that the transfer of the property was an *inter vivos* gift to Loyd. The court also found the evidence insufficient to permit a conclusion that the gift was complete and irrevocable prior to the recordation of the deed, and thus upheld the Commissioner's determination that the gift was taxable in 1963.

Tract No. 7

On August 21, 1959 Elbert and Nellie Whitt executed a warranty deed conveying 118.5 acres in Limestone County to their son, Mahlon Whitt, for $10 and other valuable considerations. This deed was recorded on September 11, 1964.

Mahlon did not pay his parents any cash for this property. He testified, however, that he had received this property in satisfaction of a debt owed to him by his father concerning a land swap with a third party. However, this testimony was highly confusing. Mahlon never did indicate precisely in what way his father owed him any money. In any event, while Mahlon now indicates that his father owed him upwards of $4,000 in connection with some other land that Mahlon had owned before 1959, the deed to Tract No. 7 made no mention of this in the recitation of consideration. As to services which Mahlon performed for his father after 1959, he testified that he would have performed them even if he had not received the property.

Mahlon testified that he did take immediate possession of the property and received the income from it and reported this income on his tax returns. He also paid the assessed property taxes.

The Tax Court concluded that Elbert Whitt retained no

interest in this property at the time of his death. However, the Tax Court discounted Mahlon's testimony that the consideration for the deed was the satisfaction of a prior debt, and concluded that the transfer of the property was simply an *inter vivos* gift. Here again, the Tax Court found the evidence insufficient to establish that the gift was complete and irrevocable at any time prior to the recordation of the deed on September 11, 1964.

Tract No. 8

On August 21, 1959, Elbert and Nellie Whitt executed a warranty deed conveying 60 acres in Limestone County to their daughter, Mary Whitt Richardson, reciting receipt of $10 and other valuable considerations. The deed was recorded on March 13, 1964.

No other evidence was offered with respect to this tract of land. Thus the Tax Court concluded that this property was includable in the estate under section 2033.

Tracts Nos. 9, 10 and 11

On August 21, 1959, Elbert and Nellie Whitt executed three warranty deeds to their granddaughter, Margaret Ann Whitt, who was then seven years old. Each deed conveyed 40 acres in Limestone County and recited the receipt of $10 and other valuable considerations. The deeds were recorded on March 13, 1964.

Margaret's father, Thomas Whitt, died in 1957. Although Margaret did not testify at the hearing, her mother, Catherine Riethmaier, and stepfather, Jack Riethmaier, did testify. Catherine recalled that subsequent to the execution of the deed, Elbert told her that he had given some land to Margaret. No money was ever paid for this land. Catherine, who was Margaret's legal guardian, took possession of the property only after Elbert's death. Neither Margaret nor Catherine paid property taxes on these parcels. Nor did

either of them receive any income from the land prior to Elbert's death, even though some of this land was cultivated and some of it was put to hogs. The hogs belonged to Elbert Whitt.

Based on Riethmaiers' testimony, the Tax Court concluded that Elbert Whitt retained an interest in each of these three tracts at the time of his death, and that all three were therefore includable in his estate under Section 2033.

Tracts Nos. 12 and 13

On August 21, 1959, Elbert and Nellie Whitt executed warranty deeds to their son, Willard Whitt, conveying 40 acres in Limestone County and 40 acres in Madison County. Each deed recited the receipt of $10 and other valuable considerations. These deeds were recorded on February 28, 1964 and March 20, 1964.

Willard did not pay any cash for these tracts. He took possession of the property, paid the property taxes and reported any income earned from the land on his income tax returns.

Although he did not pay cash, Willard insisted at the hearing that one of the reasons why his parents transferred these properties to their children in 1959 was to induce their children to live close by in order that they could provide services for them in their old age. Nevertheless, the Tax Court concluded that the evidence was insufficient to conclude that these transfers were anything but *inter vivos* gifts. Moreover, there was not enough evidence to establish that these gifts were complete and irrevocable at any time prior to their recordation.

Tract No. 14

The only deed introduced concerning this parcel of land was a warranty deed executed on March 1, 1932 by Bennie and

Ellis Reyer to Willard Whitt for a stated consideration of $650.

The Commissioner determined that this property was owned by Elbert Whitt at some time during his life and that he retained an interest in it at the time of his death. While Willard Whitt testified as to the other tracts which he had received, he said nothing about Tract 14. Certainly, any testimony that Willard purchased this property from third parties for his own use and with his own money in 1932 and had continued in the exclusive ownership of the property until the time of his father's death would in all probability have been dispositive of his father's tax liability for this property. Since the Estate had ample opportunity to elicit such testimony from Willard but declined to do so, the Tax Court upheld the Commissioner's determination that Tract 14 was includable in the decedent's gross estate.

Tract No. 16

On August 13, 1952, Elbert and Nellie Whitt executed a warranty deed conveying 110 acres in Limestone County to their son, Willard Whitt, reciting the consideration of $1500. Willard, however, never paid any cash for this land. After 1952 he provided numerous services for his parents, including planting their garden and driving them into town or to the hospital. He testified that he considered these services to be in payment for the land.

He also made additions to a house that was already on the land to enable tenant farmers to live there, and in 1963 built the house in which he is presently living. From the time that he received the land in 1952, Willard rented the land to tenant farmers. He received the income and paid the assessed property taxes.

The Tax Court was not convinced that the services which Willard performed for his parents were consideration for the property and concluded that the transfer of Tract 16 was an *inter vivos* gift to Willard. Again, it concluded that the

evidence was insufficient to establish that this gift was complete and irrevocable at any time prior to the recordation of the deed on June 21, 1963. Therefore, the court sustained the Commissioner's second alternative determination that a gift tax was owing on the transfer of this property for the year 1963.

Tract No. 17

On August 13, 1952, Elbert and Nellie Whitt conveyed 97 acres in Limestone County by warranty deed to their son, Thomas Whitt, reciting consideration of $1500.

Thomas Whitt died in 1957. This deed was recorded on November 16, 1963.

No other evidence was received concerning this property. There was thus no proof other than the deed itself that the consideration had been paid or that Thomas had taken possession of the property. Consequently, the Tax Court sustained the Commissioner's alternative determination that this was land in which Elbert Whitt continued to have an interest at the time of his death and that it was includable in the decedent's estate under Section 2033.

Tract No. 18

On August 13, 1952, Elbert and Nellie Whitt executed a warranty deed conveying 191.5 acres in Lincoln and Giles Counties, Tennessee, to their son, Alton Whitt, for a stated consideration of $3 000.

Alton testified that he paid this consideration in three annual installments of $1,000. The Tax Court thus concluded that this property was effectively sold to Alton in 1952. Thus, it was not an *inter vivos* transfer subject to the gift tax, and it was not includable in Elbert's estate.

In summary, the Tax Court concluded that the transfers of Tracts Nos. 1, 6, 7, 12, 13 and 16 were *inter vivos* gifts to the respective grantees, completed at the time the deeds were recorded. Therefore, the decedent owed gift taxes on those transfers for the years of recordation. The court also concluded that no tax was owing on the transfer of Tract No. 18. The court sustained the Commissioner's alternative determination that the decedent had retained an interest in each of the other tracts, and that they were thus all includable in his gross estate under Section 2033.

ISSUES

The principal issues raised in this appeal are:

1. Whether the Tax Court failed to apply state law in determining that the decedent had retained an interest in 11 of these parcels until the time of his death, and, if so, whether this was error;

2. Whether the Tax Court erred in finding that six of these transfers were *inter vivos* gifts subject to federal gift tax;

3. If not, whether the Tax Court erred in sustaining the Commissioner's determination that these gifts were taxable in the years in which the deeds were recorded.

DISCUSSION

A. *Standard of Review*

[1-3] In a proceeding before the Tax Court to review a deficiency determination, the taxpayer-petitioner has the burden of proving by a preponderance of the evidence that the Commissioner's determination is erroneous. *Carson v. Commissioner*, 560 F.2d 693, 695-96 (5th Cir. 1977; *Byram v.*

Commissioner, 555 F.2d 1234, 1236 (5th Cir., 1977); *Rockwell v. Commissioner*, 512 F.2d 882, 885 (9th Cir.), *cert. denied*, 423 U.S. 1015, 96 S.Ct. 448, 46 L.Ed.2d 386 (1975); *see also Ireland v. United States*, 621 F.2d 731, 736 (5th Cir. 1980) (same standard in suit for refund in district court). In making his case, the taxpayer must overcome a presumption of correctness which attaches both to the deficiency determination itself and to the facts which support it. *Rockwell*, 512 F.2d at 885; *Toledano v. Commissioner*, 362 F.2d 243, 246 (5th Cir. 1966). When the Tax Court approves a deficiency determination, its findings of fact will not be set aside unless they are clearly erroneous. *Brannen v. Commissioner*, 722 F.2d 695, 701 (11th Cir. 1984); *Cates v. Commissioner*, 716 F.2d 1387, 1390 (11th Cir. 1983). However, where a case hinges on the legal characterization of a transaction, it becomes a question of law which is freely reviewable. *Fender v. United States*, 577 F.2d 934, 936 (5th Cir. 1978); *Casner v. Commissioner*, 450 F.2d 379, 387 (5th Cir. 1971).

B. *The Estate Tax*

(1) Section 2033

The Commissioner found that all 18 properties were includable in Elbert Whitt's gross estate under Section 2036 because Elbert had retained the possession or use, or the right to income from each of the 18 parcels until his death. Alternatively, he determined that any of the parcels which were not effectively transferred during Whitt's lifetime would be includable in the gross estate pursuant to Section 2033. The Tax Court, after analyzing the parameters of Section 2036, concluded that 11 of the parcels were includable in the gross estate under Section 2033.

[4, 5] Section 2033 provides for the inclusion in the gross estate of "all property to the extent of the interest therein of the decedent at the time of his death." 26 U.S.C. § 2033.

Under general principles of federal tax law, an interest that is taxable under this section is generally one that is created by state law. *See Morgan v. Commissioner*, 309 U.S. 78, 80, 60 S.Ct. 424, 425, 84 L.Ed 585 (1940); *Estate of Bright v. United States*, 658 F.2d 999, 1001 (5th Cir. 1981) (en banc). It is the equitable ownership, rather than legal title, which is taxed. *See Commissioner v. Chase Manhattan Bank*, 259 F.2d 231, 260 (5th Cir. 1958), *cert. denied*, 359 U.S. 913, 79 S.Ct. 589, 3 L.Ed.2d 575 (1959); Treas.Reg. § 20.2033-1.

[6] We believe that the properties here are includable in the gross estate under Section 2033 only if, under Alabama law, the decedent was the equitable owner of an interest in them. Under the law in Alabama, the decedent would have the equitable interest in these properties if he had legal title and the equitable interest was not separated from the legal title, or if the property were impressed with the trust in his favor. There is simply no contention that the grantees were to hold the land in trust for their father, and it is doubtful that such a contention would be sustainable. *See Snow v. State*, 257 Ala. 614, 60 So.2d 346, 348 (1952). Thus, we believe that the decedent would have retained an "interest" in these properties under Section 2033 only if he never conveyed the legal title in the first place.[3]

The Commissioner appeared to understand this in his deficiency determination. There he emphasized that these properties were includable under Section 2033 to the extent that they had not been effectively transferred during Whitt's lifetime. Specifically, in his report of tax audit changes, the Commissioner determined that tracts numbers 5, 15 and 14 were includable under this provision because no deeds were

3. This was the situation in *Estate of Mortimer v. Commissioner*, 117 T.C. 579 (1951), cited by the Commissioner. There the evidence established that, although the decedent had recorded deeds purporting to convey certain real estate to his daughters, he had never delivered the deeds to the grantee. Thus, the Tax Court concluded that legal title never parted from the decedent during his lifetime and the property was includable under the predecessor of Section 2033. *Id.* at 583-84.

found by which Elbert Whitt conveyed away his interest therein.

The Commissioner's findings as to these three tracts was entitled to a presumption of correctness. Since no evidence at all was introduced as to tracts 5 and 15, the Commissioner's Section 2033 conclusions with respect to these properties was properly sustained by the Tax Court, and we affirm that part of the Tax Court's judgment.

A deed was introduced with respect to tract 14, by which Bennie and Ellis Reyer conveyed the property to Willard Whitt in 1932. No further effort was made, however, to establish that Elbert Whitt did not own an interest in this land at the time of his death, even though Willard was available to testify about the property. We conclude that the Tax Court was not clearly erroneous in its finding that the estate had not overcome the presumption that the Commissioner's determination was correct as to tract no. 14. We therefore affirm that part of the Tax Court's judgment.

[7] As to the other parcels, it is not so apparent to us that the Commissioner did in fact determine that these were includable under Section 2033. The Tax Court, however, concluded that they were. This is a mixed finding of law and fact which is freely reviewable.

As noted above, we believe that the remaining nine parcels were includable in the gross estate under Section 2033 only if they were never conveyed to the purported grantees during Elbert Whitt's lifetime. Since these deeds were properly executed and recorded five years before his death, however, these parcels would have been effectively conveyed at that time unless the deeds were never delivered to the grantees. *See Duncan v. Johnson*, 338 So.2d 1243, 1249 (Ala. 1976); *Gulf Red Cedar Co. v. Cranshaw*, 169 Ala. 606, 53 So. 812, 814 (1910).

Under Alabama law, proof of recordation creates a rebuttable presumption of delivery. *Henslee v. Henslee*, 263

Ala. 287, 82 So.2d 222, 225 (1955). This is certainly the rule where a deed is challenged by one who is party of privy to it. *Blount v. Blount*, 158 Ala. 242, 48 So. 581, 583 (1909). The Alabama Supreme Court has stated that a deed gives rise to no presumptions when introduced against one who is neither party nor privy to it. *Baker v. Blackburn*, 5 Ala. 417, 418 (1843). However, the court has also indicated that where a grantor's creditor challenges a deed as having been recorded for the purpose of defrauding the creditor, the recordation does give rise to a prima facie presumption of delivery, placing the burden on the creditor to prove that it was merely a sham delivery to the recording office and that no title in fact passed. *Coulson v. Scott*, 167 Ala. 606, 52 So. 436, 437-38 (1910).

[8] Whether these recorded deeds would be effective in and of themselves to create a presumption of delivery against the Commissioner in the event that he had already determined that they had not been properly executed or delivered, we are not persuaded that this is the case here. Here, the Commissioner made no affirmative finding that any of these properties other than the tracts already mentioned were includable under Section 2033 or that any of them had not been effectively conveyed. Thus, there is no presumption of correctness to overcome. Where the only evidence adduced at trial concerning a particular parcel was the recorded deed itself, we believe the Tax Court had no basis for concluding that that parcel had not been effectively conveyed to the stated grantee. Thus, we cannot affirm the Tax Court's conclusion that these parcels were includable in the gross estate pursuant to Section 2033.

(2) *Section 2036*

[9] Where, however, the factual findings permit us to affirm on an alternative ground, we may do so, at least in the absence of prejudice. *See Howard v. Gonzales*, 658 F.2d 352, 358 (5th Cir. 1981); *Stegmaier v. Trammell*, 597 F.2d 1027, 1038

(5th Cir. 1979). Since the Commissioner relied primarily on Section 2036, the Estate could hardly complain of prejudice if we were to affirm the Tax Court judgment on that basis.

[10] The Commissioner determined that at the time of his death, Elbert Whitt retained the possession or use or the right to income from each of the 18 tracts and that his conveyances of those tracts had all been gratuitous. Thus, he concluded that each of the 18 parcels was includable in the gross estate under Section 2036. The Tax Court found that this determination carried an implicit finding that Whitt retained such possession, use and right to income pursuant to express or implied agreements with the grantees. That finding is not clearly erroneous and will not be overturned.

Section 2036 provides in pertinent part:

> A. *General Rule.*—The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death—
>
> (1) the possession or enjoyment of, or the right to the income from, the property, or
>
> (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

26 U.S.C. § 2036(a).

The purpose of this section was to include in a decedent's estate gratuitous *inter vivos* transfers that are "essentially testamentary—*i.e.* transfers which leave the transfer or a significant interest in or control over the property during

his lifetime." *United States v. Estate of Grace*, 395 U.S. 316, 320, 89 S.Ct. 1730, 1733, 23 L.Ed.2d 332 (1969). So long as the decedent retained substantial present economic benefit of the property during his lifetime, it is includable. *Commissioner v. Estate of Holmes*, 326 U.S. 480, 486, 66 S.Ct. 257, 260, 90 L.Ed. 228 (1946); *First National Bank v. United States*, 342 F.2d 415, 416-17 (5th Cir. 1965).

"Possession" and "enjoyment" as those terms are used in Section 2036, mean the retention of "an income interest or, in the case of real property, the lifetime use of the property." *United States v. Byrum*, 408 U.S. 125, 147, 92 S.Ct. 2382, 2396, 33 L.Ed.2d 238 (1972).

[11, 12] Property which is gratuitously conveyed is includable in the grantor's estate if there is a contemporaneous or subsequent agreement that the grantor should remain in possession or that he should receive the income from the property. *Tubbs v. United States*, 472 F.2d 166, 166 (5th Cir.), *aff'g* 348 F.Supp. 1404 (N.D.Tex. 1972), *cert. denied*, 411 U.S 983, 93 S.Ct. 2274, 36 L.Ed.2d 959 (1973); *Guynn v. United States*, 437 F.2d 1148, 1150 (4th Cir. 1971); *Estate of McNichol v. Commissioner*, 265 F.2d 667, 671 (3d Cir.), *cert. denied*, 361 U.S. 829, 80 S.Ct. 78, 4 L.Ed.2d 71 (1959). It is not necessary that the right to possession and enjoyment have been retained in the deed. All that is necessary is that the surrounding circumstances, particularly the manner in which the parties have dealt with the property, manifest the existence of an implied agreement. *Estate of McCabe v. United States*, 475 F.2d 1142, 1146-47 (Ct.Cl. 1973); *Tubbs*, 472 F.2d at 166; *Guynn*, 437 F.2d at 1150. Such an agreement need not be enforceable under state law in order to bring the property back into the decedent's estate. *McCabe*, 475 F.2d at 1146; *McNichol*, 265 F.2d at 670.[4]

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4. Contrary to the Estate's contention, we believe these decisions are entirely consistent with Alabama law. In *Snow v. State*, 257 Ala. 614, 60 So.2d 346 (1952), a man deeded realty to his sister and recorded the deeds, though he

(Continued)

[13] In *Tubbs* the decedent had, five years before her death, conveyed 480 acres from a 1,293 acre tract which she owned, to her daughter for a recited consideration of $10. The deed was subsequently recorded. From the time the deed was executed, the decedent continued to receive the entire income from the property, including oil and gas and crop rentals. She also paid property taxes on the land and claimed depreciation for the improvements. The decedent reported all of the income, while the daughter reported none of it. The Commissioner assessed a deficiency under Section 2036. The daughter, as executrix, sued for a refund. The district court concluded that the executrix utterly failed to carry her burden of proving that the decedent had not retained the right of possession and enjoyment and the right to the income from the property. 348 F.Supp. at 1406. Our court summarily affirmed, noting that the property was properly included in the estate because the "facts establish[ed] conclusively the existence of an implied agreement that the transferor was to have lifetime enjoyment of the property." 472 F.2d at 166.[5]

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4. (Continued)
continued to exercise the right of control and retained its beneficial use. The sister never claimed the ownership of the property and held title merely as an accommodation to her brother. The brother later arranged for the sale of the property to a third party, had his sister endorse the proceeds over to him, and claimed a loss on his income tax return. The sister did not report the sale. The State Department of Revenue assessed a deficiency against her, finding that she had realized a $25,000 gain on the sale. The Alabama Supreme Court, however, reversed on the ground that she had at no time enjoyed the beneficial ownership of the property and consequently was not liable for the taxes on the sale. *Id.*, 60 So.2d at 348-49.

In noting this, we caution that we are here concerned with a question of federal tax law which does not depend on its consistency with state law.

5. This Court's decision in *Estate of Wyly v. Commissioner*, 610 F.2d 1282 (5th Cir. 1980) has no application to this case. There we held that a husband who gave his community property interest in certain assets to his wife did not retain the right to the income generated by those assets by virtue of Texas community property law, since under that law his only interest in that income was the expectancy of an accounting in the case of fraud. *Id.* at 1294. Here, on the other hand, the Commissioner and the Tax Court found that the economic benefit which the decedent enjoyed in these properties until his death was substantial, direct, and present.

The tracts which the Tax Court erroneously included in the estate under Section 2033 fall into two groups: those about which testimony was received, specifically the properties conveyed to the decedent's granddaughter, Margaret Ann Whitt; and those about which no evidence was received other than the deeds themselves.

With respect to the former group, we believe that the testimony of the Riethmaiers demonstrated conclusively that Elbert Whitt placed tracts 9, 10 and 11 in his granddaughter's name with the understanding that he would continue to farm the land and raise pigs there and that he alone would derive the income from those properties until his death. Moreover, neither the stated grantee, Margaret, nor her guardian took possession of the land or received any of the income until after Elbert had died. Thus, we conclude that these three parcels were includable in the decedent's gross estate under Section 2036 and affirm the Tax Court on that ground.

As to the remaining parcels, the Estate had the burden of overcoming the presumption of correctness attaching to the Commissioner's finding that Elbert Whitt retained the possession and use of the property and the right to the income under implied agreements with the grantees. The introduction of the deeds alone did not meet this finding. Section 2036 presumes that legal title has been transferred, and this is all that the deeds proved. The burden was on the Estate to disprove the existence of an implied agreement whereby the decedent retained the use of the land and the right to the income therefrom despite the transfer of legal title to the children. Clearly the Estate has not done this. Thus, the Commissioner's determination that parcels 2, 3, 4, 8 and 17 were includable under Section 2036 should have been sustained. We therefore affirm the Tax Court's inclusion of these properties in the decedent's gross estate.

C. *The Gift Tax*

[14] The Commissioner concluded that, if any of the

parcels were effectively transferred during Elbert Whitt's lifetime, such transfers were for less than adequate and full consideration and were thus subject to the gift tax. He further determined that, in the absence of evidence to the contrary, the gifts were to be treated as completed in the years in which the deeds were recorded, 1963 and 1964, rather than the years when they may have been executed and delivered. The Tax Court held that, while there was sufficient evidence to conclude that parcels 1, 6, 7, 12, 13 and 16 were effectively transferred during Whitt's lifetime, these conveyances were gifts which, as the Commissioner determined, were not completed until 1963 and 1964. This is a finding of fact which will not be overturned unless clearly erroneous.

A transfer of property is deemed a gift if it is "for less than an adequate and full consideration in money or monies' worth." 26 U.S.C. § 251(2)(b). The Commissioner determined that, at the time these deeds were recorded, each of these properties was worth at least $8,967.10. The deeds, however, recited receipt of merely nominal consideration, specifically $10, and the persons who received these properties uniformly testified that not even that was paid. While they did testify about various services which were afterwards performed for their parents, the Tax Court found that these services were not in fact bargained-for considerations supporting the transfers. This finding was not clearly erroneous and will not be disturbed.

Prior to 1970, the gift tax was to be paid by the donor in the calendar year in which the gift was made. *See* 26 U.S.C. § 2501(a) (amended 1970). The tax is imposed only on completed gifts. A gift is deemed complete if "the donor has so parted with dominion and control as to leave in him no power to change its disposition, whether for his own benefit or for the benefit of another." Treas.Reg. § 25.2511-2(b). The elements of a completed gift have been identified as

(1) A donor competent to make the gift; (2) a donee capable

> of taking the gift; (3) a clear and unmistakable intention on the part of the donor to absolutely and irrevocably divest himself of the title, dominion, and control of the subject matter of the gift, *in praesenti*; (4) the irrevocable transfer of the present legal title and of the dominion and control of the entire gift to the donee, so that the donor can exercise no further act of dominion or control over him; (5) a delivery by the donor to the donee of the subject matter of the gift or of the most effectual means of commanding the dominion of it; (6) acceptance of the gift by the donee....

Guest v. Commissioner, 77 T.C. 9, 16 (1981); *Weil v. Commissioner*, 31 B.T.A. 899, 906 (1934), *aff'd*, 82 F.2d 561, 562-63 (5th Cir.), *cert. denied*, 299 U.S. 552, 57 S.Ct. 14, 81 L.Ed. 406 (1936).

It is true that under Alabama law, a conveyance of real property is ordinarily irrevocable as between the parties to the deed even though no consideration is paid. *Russell v. Russell*, 361 So. 2d 1053, 1054 (Ala. 1978); *Taylor v. Godsey*, 357 So.2d 979, 980 (Ala. 1978).

[15] However, Alabama law also requires that, in order for an *inter vivos* gift to be complete, the donor must clearly intend to relinquish title and all present and future dominion over the property; the property must be delivered to the donee; and the donee must accept the gift. *First Alabama Bank v. Adams*, 382 So.2d 1104, 1110-11 (1980); *White v. Sims*, 326 So.2d 733, 734 (Ala. 1976); *Garrison v. Grayson*, 284 Ala. 247, 224 So.2d 606, 608 (1969). Thus, under Alabama law, as well as under federal tax law, these gratuitous conveyances of real estate to the decedent's children were not completed gifts until the decedent intended to part irrevocably with his dominion over the property.

[16] The Commissioner determined that these transfers did not become completed gifts until the deeds were recorded. Implicit in this determination was a finding that, absent evidence to the contrary, Elbert Whitt did not possess the necessary intent until the time of recordation, because

only recordation would protect these deeds against a subsequent disposition of the property by Elbert Whitt.

The Alabama Recording Act provides in pertinent part:

> (a) All conveyances of real property . . . are inoperative and void as to purchasers for a valuable consideration, mortgagees and judgment creditors without notice, unless the same have been recorded before the accrual of the right of such purchasers, mortgagees or judgment creditors.

Ala. Code, § 35-4-90 (1975).

Thus, until these deeds were recorded, it remained within Elbert Whitt's power to defeat them by executing deeds to the same properties to bona fide purchasers for value without notice. Likewise he retained the power to execute mortgages on these parcels so long as his mortgagees were without notice of the conveyances to the children. Only when the deeds were recorded did he relinquish the control which he had over the disposition of these properties under the local recording statute.

We do not say that in every instance a gift of real property is incomplete for federal tax purposes until the deed of conveyance is recorded. All we are saying is that in this case there were sufficient facts from which the Tax Court could conclude that these gifts were not intended to be completed until the recordation of the respective deeds. Most of these deeds were executed on the same day, reciting merely nominal consideration. None was recorded for several years thereafter. All of them were then recorded within a period of 15 months. One other fact lends considerable weight to the Tax Court's finding. At no time prior to the recordation of these deeds did the decedent, who was liable for the gift tax, report any of these transfers of taxable gifts, though they were clearly made for less than adequate and full consideration. The Estate can

hardly be heard to complain now that Elbert Whitt really intended that these gifts should take effect in an earlier year, though he never declared them as gifts prior to their recordation.

The Tax Court's finding was thus not clearly erroneous. We therefore affirm that part of the judgment which holds that the estate is liable for gift taxes on the transfers of parcels 1, 6, 7, 12, 13 and 16 in the years of recordation, 1963 or 1964.

AFFIRMED.